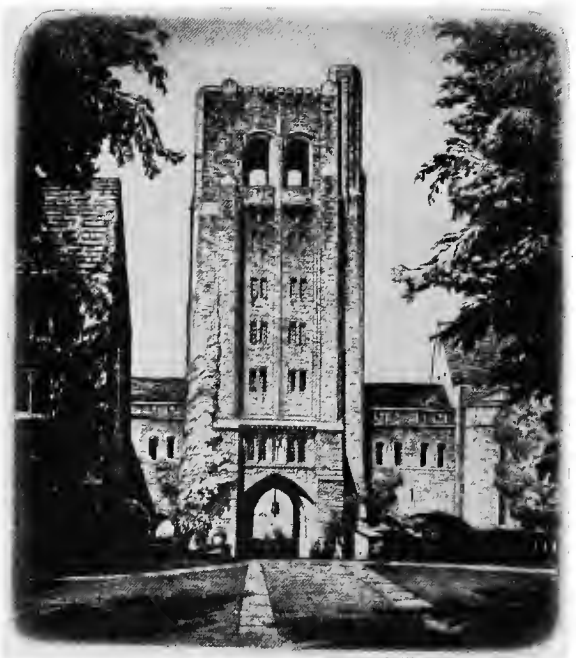
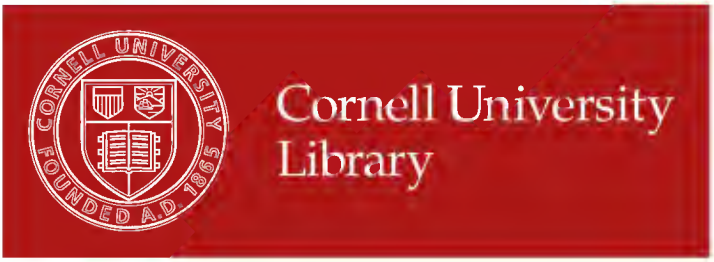
KF
478
G76



Cornell Law School Library

KF 478.G76
Cornell University Library
Law and the family,
3 1924 018 800 072



The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

http://www.archive.org/details/cu31924018800072

LAW AND THE FAMILY

BOOKS BY ROBERT GRANT

LAW AND THE FAMILY.

THE HIGH PRIESTESS. 12mo

THE CONVICTIONS OF A GRANDFATHER.

THE CHIPPENDALES. 12mo

THE UNDERCURRENT. Illustrated. 12mo

UNLEAVENED BREAD. 12mo

THE LAW-BREAKERS. 12mo

THE ORCHID. Illustrated. 12mo

SEARCH-LIGHT LETTERS. 12mo

THE ART OF LIVING. 12mo

THE BACHELOR'S CHRISTMAS, AND OTHER STORIES. Illustrated. 12mo

THE REFLECTIONS OF A MARRIED MAN. 16mo

THE OPINIONS OF A PHILOSOPHER. Illustrated. 16mo

JACK HALL. Illustrated. 12mo

JACK IN THE BUSH. Illustrated. 12mo

CHARLES SCRIBNER'S SONS

LAW AND THE FAMILY

BY

ROBERT GRANT

JUDGE OF THE PROBATE COURT, BOSTON

NEW YORK

CHARLES SCRIBNER'S SONS

1919

B10433.

COPYRIGHT, 1916, 1917, 1918, 1919, BY
CHARLES SCRIBNER'S SONS

Published October, 1919

CORNELL UNIVERSITY
NOV
6
1919
LAW LIBRARY

FOREWORD

(BEING AN EXTRACT FROM VERSES READ AT A BAR ASSOCIATION DINNER)

A Probate Judge who talks in verse
Suggests a decorated hearse;
But these slow lips I cannot teach
To make an after-dinner speech.
So I will utilise my time
By dropping briefly into rhyme.
A Probate Judge who outlives you
May break your will—yes, tax it, too.
Concerning various other things
His power outrivals that of kings:
If he decides you are insane,
All your remonstrances are vain.
A spendthrift—he can cut you short.
Your wife asks separate support
And finds the Judge her nearest friend.
You drink—and Foxboro is the end.
Your children, when you prove unfit,
Are whisked away by sovereign writ.
If your accounts aren't just and true,

Upon your bond the Judge will sue.
In short, it may be truly said
He has you living, has you dead.
The moral is—as on you trudge,
Propitiate the Probate Judge.

Patient he sits, while year by year
Old women whisper in his ear;
All sorts of skeletons he knows,
Sad secrets told beneath the rose.
He may not lay his bosom bare;
He turns the key and keeps them there.
Where are there fiercer battles fought
Than those peculiar to his Court?
When rival kinsman children claim;
When cestuis hold trustees to blame;
When cousinly greed backed up by skill
Conspires to break a rich man's will.
And if the lawyers compromise,
He knows the fees and gently sighs.

If you desire to change your name
The Probate Judge permits the same;
And ere the very youthful wed
His nod must bless the nuptial bed.

He construes the obscure devise
And shows the difference which lies
'Twixt Tweedledum and Tweedledee,
Which is sometimes hard to see.
In times of stress his powers prevail;
He sends contemptuous folk to jail,
And by injunction's awful might
Protects the weak and guards the right.
Thus equity corrects the flaw
Which justice finds in common law.

And yet as judges go, has not
The Probate Judge a happy lot?
He always sleeps in his own bed
And eats three well-cooked meals instead
Of tempting a dyspeptic fate
By frequent circuits through the State
As other Courts are forced to do.
He lives at home and knows who's who.

I

WOMEN AND PROPERTY

I

WOMEN AND PROPERTY

By the will of a deceased lawyer of national reputation it appeared recently that one of the two executors and trustees named was a woman. The provision was unusual enough to provoke the inquiry: How did he happen to select her? When it was explained that she was his private secretary and had kept his books for many years, both captious conjecture and latter-day common sense were satisfied. An appointment anomalous a generation ago, except of a wife, ceased to be even an idiosyncrasy the moment the nominee's qualifications were disclosed. One could see that the choice had its advantages; that it would save trouble

and accelerate the handling of the estate. While the testator undoubtedly intended it as a mark of confidence and gratitude, his controlling motive must have been the woman's fitness.

This instance provokes another—a double-barrelled—inquiry: Why should not women have a greater share in the management of property, and why should they not understand more about property than they do? Their own property in the first place, but also other people's. In spite of the revolution in public sentiment concerning what woman is free to do and ought to know, property in the sense of anything larger than a purse or very moderate bank-account remains virtually a sealed book to her. It compares with a Sacred White Elephant—a tutelary divinity, but august and unapproachable. Moreover, this awesome attitude is en-

couraged by prevalent masculine opinion, which, if invited to decide by a referendum whether she would do better as a bishop or a banker, would declare that, though out of place as either, she could not do much harm as a bishop, but as a banker would inevitably make a mess of things. Indeed, the blue line in Durham Cathedral beyond which no woman was allowed to pass has proved with the march of time a far more evanescent prejudice than the taboo of the money-changers. Men still hug the tradition that in money matters women are constitutionally helpless and need looking after.

This tradition dies hard, because its decayed roots are ponderous with law verbiage. For centuries the status of a woman while single was solemnly defined as *femme sole* and after marriage as *femme covert.* Veritably it may be

said that the second estate of that woman was far worse than the first. A *femme sole* was in legal phraseology an "infant" until her majority, but after attaining it she had full possession and control of her property. If she was rich, it was scarcely reputable that she should not marry unless she became a nun; consequently the interval between minority and wedlock was, so to speak, 'twixt hay and grass. Nevertheless, if she defied social sentiment and remained single, the law protected her ownership. She might be choused out of her possessions, but she could not be deprived of them. The instant she married, however, she became *femme covert*, and every attribute of ownership ceased.

Of every human status devised by civilisation that of the *femme covert* was the most ignominious, though it wore

the air of chivalrous concern for the inherent helplessness of women. So absolutely did the law insist on merging her entity in her lord and master's that if she committed a crime (unless it were very atrocious), she was assumed to have acted at his instance and he was held responsible for it. She was more completely a cipher than any other soul on the sunny side of barbarism, and the aftermath of her legal obliteration crops out even in our day in the maxim of the domestic hearth, albeit playfully uttered: "What's yours is mine, my dear, and what's mine's my own." The author of "The English Woman's Legal Guide" (London, 1913) states her quondam predicament succinctly as follows:

"By the common law, prior to the series of acts known as the Married Women's Property Acts, 1870–1908, a

woman by marrying stood to lose, either permanently or during married life, all actual benefit in any property of which she was at the commencement of or might during the marriage be possessed. The theory was that 'a man and his wife are but one person in the law,' which sounds as favourable to wife as to husband, and which if literally applied would have meant equal enjoyment by both of their common property. This, however, was not the meaning given to the phrase in practice. The real meaning would be expressed better by saying that 'a man and his wife are but one person in the law, and that one person is the man,' since the immediate interest in the whole of her property passed to her husband, while his property continued to belong to him solely."

So genuine did this legal fiction—that

a married woman could not own anything—seem to the legal mind that as time went on and a desire was felt to protect the dowries of wives from the rapacity or debts of husbands, recourse was had to circumvention. Barred from declaring that a wife's property should continue hers, the lawmakers of the period devised a method of tying it up so that her spouse or his creditors could not reach the principal, and so that the yearly income should be paid over to her own use. This method survives in the comparatively modern system of trusts by which estates in Great Britain or the United States can be kept intact during a generation or so for the support of widows, unmarried daughters or spendthrift sons, and protection against sons-in-law. Yet, although because of its historic origin, the tradition of woman's financial inepti-

tude lingers, it is some time now since the common-law fiction holding her incapable of ownership after marriage was done away with as an absurdity in English-speaking countries. In the United States, where it obtained for a while as a part of the legal code inherited from England, the repudiation has been well-nigh universal. To quote from "The Legal and Political Status of Women in the United States" (1912), which should be authoritative on the point because written by a woman: "In most of the States at the present time property of every kind owned by either husband or wife at time of marriage, or acquired during the marriage by gift, devise, bequest, inheritance, or purchase, constitutes the separate estate of such husband or wife, and is not liable for the debts of the other, but it is liable for the debts of the one who owns

the property whether they were incurred before or after marriage."

And yet, though restrictions on feminine ownership are obsolete and have long since ceased to be an incentive to lack of familiarity with money matters, the American woman is peculiarly ignorant of everything pertaining to finance. Much more so than the women of the Latin countries, who, especially in the shop-keeping class, are often vigilant partners in their husbands' fortunes, and who pride themselves on keeping the domestic pot boiling by insisting on full money's worth in their daily purchases. The European woman has the habit of saving, the American that of spending, and, as has been often pointed out, the husband of each is mainly responsible for the antithesis. Unlike her foreign sister, who is schooled from childhood to regard

extravagance as a deadly sin, the American wife, in nine cases out of ten, feels free to indulge even her caprices and then collect at the source.

Now that the challenge of war has demanded economies, we hear it said that a French or Italian family could subsist on the contents of many an American housewife's garbage pail. True as this probably is, the blame belongs no more to her than to her husband, who, dazzled by the resources of this amazing continent where every man hopes to better himself, would not be pleased unless she gave him red meat constantly, and in her own province put her best foot forward. Good provider as the American husband is, he will not be able to go on indefinitely giving his wife a free hand unless she co-operates in eliminating what they do not require or cannot afford. The op-

portunities for rapid self-advancement will diminish as our population grows more dense. On the other hand, after taking fully into account the growing vogue for economic independence, who can doubt that the vast majority of women will continue to allow men to support them? The clinging vine is likely to remain the hardiest of annuals in the rosebud garden of girls. The American wife of the future is sure to be less wasteful and to know more of food values if not eugenics, but when it comes to money matters her chief function (like Oliver Twist's) will still be "asking for more," and if she inherits stocks and bonds she will be little less apt than formerly to hand them over to her husband to care for.

There will be exceptions, and it is desirable that there should be; but it is in the interest of women seeking eco-

nomic independence rather than of the housewife that this mystification concerning property needs clearing up. It is even more disproportionate than the panic due to a scampering mouse. After all, mice once in a while do invade the person, but the primary principles relative to dividends and coupons are too simple to justify confusion in any brain. In every large community a much-respected body of men makes a living, frequently a very comfortable living, by taking care of other people's property. They are known as trustees, a term that includes executors, guardians, and all who hold in a fiduciary capacity. Their first requisite is probity—to be scrupulously honest; they should possess good judgment, which is almost a synonym of common sense, tact, show themselves punctual accountants, and preferably be erudite in

the branch of the law that governs the devolution of estates. That integrity is the paramount consideration in the minds of those who employ them appears from the current tendency to select trust companies as fiduciaries. A trust company has no soul (the courts decided long ago that every corporation lacks one) and it does not pretend to know law, but a trust company cannot abscond and its capital stock is a bulwark against peculation. It trains some employee as an expert, or if an abstruse or knotty point arises, it sends for a lawyer and deducts the amount of his bill from the beneficiary's income.

In my experience the vast majority of individual trustees are honest, and the instances to the contrary if we take number and opportunities as a measure, comparatively rare. They are scrupulous in the performance of

their duties, and, now that inheritance and complicated income taxes have doubled these, their bed is not always one of roses. I have no wish to underrate their responsibilities or disparage their efficiency by asking why woman should not enter into competition with them, and why woman is not better adapted for this employment than for certain others which she aspires to share. To me her chief stumbling-block would seem to be that she has made a bogy of property.

Every fresh batch of candidates for the bar shows, I believe, an increasing percentage of women. They still seem lost in the multitude of male practitioners, and whatever the future has in store for them, thus far produce an impression that, Portia to the contrary notwithstanding, they are at a disadvantage in forensics. Women speak admi-

rably, often quite as well as men, before committees and on formal occasions; but in the hurly-burly and give and take of court practice they are handicapped by their own nicety, the abandonment of which makes them appear either shrewish or strident. Conspicuous laurels in arguing questions of pure law before courts of last resort are still to be won. Their professional activities for the most part are confined to quasi office work, the collection of claims,—often forlorn hopes,—the redress of minor grievances, and the preparation of probate papers—matters that require integrity, patience, tact, and love of detail, all of them qualities essential to the care of property. Women have the reputation of being honester than men, but whether this is due to previous lack of opportunity only time will show. When it comes to patience, tact, and

love of detail they should compare favourably with the average male competitor.

The old-fashioned trustee resembled a czar. Occasionally he does still. Because clothed with the legal title to the property in his charge, he was apt to conduct himself as though it were really his, and beneficiaries could not afford to ask many questions unless they would be snubbed. The courts abetted him somewhat in maintaining this attitude of "none of your business." The modern trustee is a much more approachable person, for the law, imbued with the "new freedom," no longer countenances the policy of keeping the real owners at arm's length. But, though usually suave, he is on guard against the importunities of those entitled to the income which he collects, most of whom are

women whose patrimony has been tied up for life. Perplexed as they often are why property does not yield a larger return, or why he feels constrained to add this or that increment to capital instead of paying it over, many women hanker to catechise the trustee —ask a string of questions, no matter how foolish. This is difficult when the listener is a man; they shrink into their shells in a presence which, however kindly, is from force of habit condescending. If they had a woman to deal with, they would regard a heart-to-heart talk—encouragement to ask indiscriminate questions—as an essential of satisfactory service. Is it extravagant to allege that many female beneficiaries would rather have their interests safeguarded by a woman than a man except for a single consideration—the fear of her not proving equal to

the responsibility through lack of equipment? Or that but for this dread many women property-owners would elect to manage their own affairs or to hand them over to some congenial person of the same sex?

Woman seems to be constitutionally gun-shy when confronted with mortgages, stocks, and bonds; she sheers off as if afraid of being hit, and manifests a like tendency to become panic-stricken or obfuscated over rates of interest or the distinctions between capital and income. She has no fear of money in the bank so long as she does not overdraw her accounts, but becomes dazed with apprehension when any question of investment is broached and is apt to murmur: "I leave it all to you." This is explicable enough on the theory that her mind has been a blank on these subjects for centuries, but far

from flattering to her intelligence if inherent difficulties be the test. The ability to make two blades of grass grow where only one grew before approximates genius in the constructive type of modern financier, but that demanded of the successful custodian of property need not rise above the level of normal vigilant wisdom. This normal wisdom seems beyond feminine attainment largely because of the outlook which it presupposes. From generation to generation when girls were being grounded in needlework and household deftness their brothers were already listening in the smoking-room to the small talk of their elders concerning the rise and fall of securities. But it is no severe tax on the intellectual faculties to acquire a speaking acquaintance with the railroads and manufacturing companies of one's hab-

itat. Any woman worth her salt giving her mind to it ought to find the study and comparison of statistics enabling her to discriminate between investments no more difficult than algebra. The good judgment, alias the normal wisdom, of the male trustee is derived from the analysis of reports, the weighing of probabilities, and the nosing out of inside information. From these he reads the signs of the times, and if he reads them correctly he prospers. But there is nothing in the vocation which should bid a woman quail except a conspiracy by masculine freemasonry to discourage her in advance—an odious improbability. The primary rules of the game, which seems so terrifying at the outset, are almost as easy as the alphabet: that a return of four to five per cent spells safety and any more than this involves a spec-

ulative risk which it is sometimes prudent and far oftener not to take; that a mortgage and a bond, however formidable to look at, are severally nothing but interest-bearing promises to pay secured by collateral, the first by land, the second by the property of the corporation which issues it; and that stock certificates are merely shares in a corporate partnership entitled to dividends after the coupons on the bonds and other fixed charges have been met.

A few months' study, supplemented by a little practical experience, would enable any reasonably intelligent woman to master these and other elementary technicalities; at least to cease to think of them as bugaboos. Thus equipped she would no longer be handicapped by her inveterate and once-cherished disability of being unable to comprehend the language of the money-

changers. With this removed, and provided she kept in mind that the admonition, "Seest thou a man diligent in his business? He shall stand before kings," has greater application to her sex because of a certain scatter-brain, atavistic tendency, she ought not to be at a disadvantage in the arena of competition on the score of ignorance. Her progress would be gradual, but the reactionaries of her own sex reluctant to employ her would presently be outnumbered by those ready to reward her zeal and winsome amiability. She would not be so apt to be grouchy or dictatorial as men. And yet the ultimate test of the rivalry—the criterion of her fitness—must be the quality of her brain cells, for the prudent and discerning care of property rights is in the end a serious intellectual process.

Is there a congenital kink in woman's

cranium which would interfere with her success as a custodian of property or fiduciary? Let me illustrate by an object-lesson which, though gleaned from fiction, was widely recognised as veracious on its appearance, nearly twenty years ago, under the title of "The Woman and Her Bonds." The heroine of Edwin Lefèvre's short story was a widow with $38,000 to invest, and the hero (or victim) a stock-broker who had been her husband's intimate friend and was desirous to do her a good turn. We make her acquaintance at his office, eager to ascertain how she can get a larger income from her money than the trust company where it is deposited is allowing her. Mr. Colwell advises the purchase at 96 of 100 five-per-cent gold bonds of the Manhattan Electric Light, Heat & Power Company, in regard to which, as he tells her,

he has inside information. She is to deposit with his firm as a wide "margin" all but $3,000 of her $38,000 and wait quietly until he shall market the bonds, as he confidently counts on doing at a ten-per-cent profit, which would be a handsome addition to her capital. He informs her that he has bought some of the bonds for his own mother, and that she can always find them quoted on the financial page of the newspapers.

Mrs. Hunt departs, but returns anxiously three days later to point out that Manhattan Electrics are selling at 95 instead of 96. She is assured that this signifies nothing and is urged not to worry. She goes away, only to reappear in another week with a dejected air, for the bonds have fallen to 93. When, in response to her remark that according to a friend she has lost $3,000 by the transaction, Mr. Colwell pro-

poses to take her purchase off her hands for his own account at the original price and return all her money, she jumps at the offer and goes away happy. But it is not very long before the bonds rise to 95 again and then to 96. This prompts another visit by the widow to the broker's office.

"Mr. Colwell, you still have those bonds, haven't you?"

"Why, yes."

"I—I think I'd like to take them back again."

"Certainly, Mrs. Hunt. I'll find out how much they are selling for."

The quotation telephoned proves to be 96½, which, as the broker points out, is practically the price at which she bought them originally.

Mrs. Hunt hesitates, and inquires: "Didn't you buy them from me at 93?"

Mr. Colwell explains that he bought

them from her at 96 and gave her the full sum that she had paid.

She makes answer: "Well, I don't see why it is that I have to pay 96½ now for the very same bonds I sold last Tuesday at 93. If it was some other bonds, I wouldn't mind so much," and though Mr. Colwell, knowing the plans of the syndicate, does his best to induce her to change her mind and to let him purchase them for her, she goes away obdurate and disgruntled.

The sequel is heartrending. Manhattan Electrics rise steadily, and when they are quoted at 106 back comes Mrs. Hunt.

"Good morning, Mr. Colwell; I came to find out exactly what you propose to do about my bonds."

Then, finding him mystified as to her meaning, she continues: "But never mind. I have decided to accept your offer; I'll take those bonds at 96½."

"But, Mrs. Hunt, you can't do that, you know. You wouldn't buy them when I wanted you to and I can't buy them for you now at 96½. Really, you ought to see that."

The widow remains unable to see why she is not in the right, and makes her final exit in high dudgeon, threatening to consult a lawyer.

Compression has obliged me to omit the finer shades of the entertaining story, but the mental obliquity it suggests is obvious enough. Yet I have met women unable to see anything odd in her attitude. No one except a woman could possibly see the matter in that light, except an occasional clergyman. I remember some years ago being asked by a member of that profession to take a trustee to task for imposing on a poor woman. On the day appointed for the investigation it appeared that the fiduciary had re-

ceived from the testator ten bonds of a construction company yielding eight per cent, which the complainant himself hastened to characterise as a "mortgage on a lot of rotten old cars." These had been sold at par and the proceeds prudently invested. When, puzzled, I inquired what the imposition was, the clergyman promptly answered: "Don't you see? She used to receive eight hundred dollars yearly and now she only gets six."

"But," I urged, "the former investment was hazardous, as you admit. What can the trustee do?" And then came the extraordinary assertion, yet made in good faith: "He ought to pay her the difference out of *his own pocket.*"

I was unable, though I laboured hard, to make this clergyman see it otherwise.

While these examples certainly sug-

gest a kink in the brain, they scarcely furnish grounds for deeming it organic rather than functional—or, in other words, incurable. On the contrary, the assumption is much more credible that the obliquity they indicate is due to a lack of experience and worldly wisdom which has, as it were, atrophied certain ordinary mental processes. Common sense, to say nothing of a sense of justice, is largely a matter of background and is hardly to be expected of one traditionally banished from any specific field of inquiry. There is no one more shrewd in bargaining than the woman of continental Europe who sells vegetables and posies, and this is simply because she is schooled to give her whole mind to her trade. Much the same set of faculties is exercised by the successful guardian of property as by the successful huckster. It is simply

a question of sufficient attention and interest. With these assured, the kink which produced the ethical vagaries of "the woman and her bonds" would speedily desert the brain of any woman who for self-support or self-protection sought to master the rudiments of financial knowledge. It would not be long before she would be able to think in terms of principal and interest or stocks and bonds almost as subconsciously as she appraises foulards and bombazines.

It will be argued by some that sophistication in money matters would render women sordid and thereby imperil the attribute we call charm. The less liberal men are in their views concerning feminine freedom, the more likely are they to lie awake nights wrestling with this particular dread—the loss of fascination. I am not suggesting

that all women should become adepts in finance, but that systematic training in the care of property would open to a group of women a bread-winning occupation where they would shine eventually to better advantage than in some other quasi-masculine callings, and that a little resolute familiarity with its every-day symbols would add materially to the self-respect and convenience of the sex at large. While it would be essential for those with professional aims to avoid amateurishness, acquaintance with the rudiments of business knowledge possessed by most men would render women in the aggregate far more independent and level-headed. So far as sordidness is concerned, it used to be admitted that the helpless sex yearned for money and delighted in its expenditure. If this be true, why should enlightenment as to its sources

and how it is safeguarded mar this virgin tendency? On the contrary, it should serve to make women more ambitious to make their dollars go as far as they will.

There are, to be sure, especially in our day and generation, people to whom the mention of property is repugnant and to whom any association with it imports a lowering of spiritual tone. They would like to see the world get along without it, and pending that blessed day they are "eating the air on promise of supply." I remember that some years ago a reviewer dismissed a novel of mine with the solemn anathema: "This is a novel of property." It was the ultimate word. He was unconscious of cant, I dare say, but who can doubt that he would have been glad of my royalties, or to have some aged relative die and leave him a windfall? In spite of the leaven of the new

freedom we still live in a practical age, which continues to protect individual ownership by bank-accounts and strong boxes. Even Liberty bonds may be lost or stolen and should be sheared of coupons twice a year. Up to this time the custodians of property have been men. It may be women are honester than men. Let us stifle a lingering doubt whether they have the same amount of brains, and declare that there is no reason except inexperience why they should not manage their own business affairs and those of others to a greater extent than they do. They would be very pleasant to deal with; yet sex would be no protection against the loss of dollars by poor judgment. So I venture to repeat and italicise the homily: "Seest thou a *man* diligent in his business? He shall stand before kings."

II

THE THIRD GENERATION AND INVESTED PROPERTY

II

THE THIRD GENERATION AND INVESTED PROPERTY

I RECALL that some years ago, when a will had been set aside by a jury, and after long delay in the settlement of the estate the hour for division among the victors had arrived, the attorney for two of them shook his head and remarked in an undertone for my ear: "I hate to pay this over; it won't last long." A glance at his clients threw light on his solicitude; they evidently belonged to the flotsam-and-jetsam order of society. It seems they were second cousins of the testator, who had not intended them to have a nickel; but after long waiting they were to receive

about four thousand dollars apiece, and were correspondingly eager. Both bench and bar were powerless to prevent the transfer, for no one can be adjudged a spendthrift in advance, and the suggestion already made by their counsel that they put at least a portion of this treasure-trove in trust had been met with a suspicious "Why should we?"

The gist of the anecdote lies in the sequel. When I next ran across the attorney who made the prediction, he threw up his hands and said: "I was short of the truth. It took them less than a week to blow in the entire eight thousand. They're penniless, and they drifted into my office yesterday to see if I couldn't recover some of it." Naturally I was horrified and shocked, unspeakably so for a moment. Then I caught myself smiling. I saw their

point of view, pathetic as it was. They had merely misapplied the poetic license:

> "One crowded hour of glorious life
> Is worth an age without a name."

It was easy to picture what had happened. They had embraced their first and only opportunity to live as they imagined those with large means did live—to taste all the costly and forbidden pleasures, to squander royally and be robbed in the process. Eight thousand in less than a week! Colossal; comparing favourably with whatever the plutocrats could do; they wished to be in the running just for once to see how it would feel. *Magnifique, mais ce n'est pas la guerre.* Yet I smack sufficiently of the Old Adam to be able to sympathise with them; whereas those more deeply imbued with the new free-

dom—shall we say respectfully those who smack of the New Eve?—would experience nothing but distress and exclaim: "How pitiable!"

The importance of not exceeding one's income is a hackneyed homily engagingly elaborated by the late Mr. Micawber, who would nevertheless have enjoyed sitting in with the gentry above referred to; yet even as according to our texts we divide mankind arbitrarily into sheep and goats, fat and lean, industrious and idle, we draw a line between those who do and those who do not distinguish capital from income. The obligation so to distinguish rests on no one. In this freest of countries it is permissible to make one pot of everything—and four-fifths of us are obliged to. Perhaps the most unpopular word in the lexicon of contemporary speech is "capitalist." Every one,

from the executive to the tax-collector, and from the tax-collector to the man in the street, loses no opportunity to discredit it. A cynic might have convincing grounds for the belief that a capitalist in this country is any one who possesses more than the user of the term. Thus a dish-washer who inherits a thousand dollars becomes one in the eyes of the less fortunate pick-and-shovel man next door. But stripped of its cant, a capitalist may be said to be any individual whose support is derived either wholly or in part from the income of investments. A reprehensible status truly, yet not without its apologists. We can all recall the example of the statesman—one of our greatest Commoners—who, after forbidding us to press down the crown of thorns upon the brow of labour or crucify mankind upon a cross of gold,

felt unable to live on his salary of twelve thousand dollars as United States Secretary of State, and went on circuit with yodlers and bell-ringers in order to eke it out. And why? Because he did not wish to eat into his capital, which was said to aggregate several hundred thousand dollars. What better authority could we desire for the proposition that despite stump oratory the accumulation of wealth is not deemed un-American, even by apostles of the new freedom, some of whom are adepts at it. Our savings-banks, with their huge and accumulating deposits, are the best proof that thrift is still the motto of the American people; and what would become of our churches, colleges, hospitals, and diverse eleemosynary or scientific bodies, but for the income from invested property—theirs or somebody else's—which keeps

them stable? When one reads the newspapers or talks with social reformers, it is sometimes difficult to believe that the practice of laying by a penny for a rainy day has not ceased to be respectable. Perhaps we were in need of just such a fillip as the government's call for billions of dollars from the savings of the people to remind us that any human panacea based on obliterating the distinction between principal and income is likely to prove an *ignis fatuus*.

The spendthrift, as we have seen, is a person to be reckoned with and protected; likewise heirs presumptive of immature years and daughters after coverture. Such has been the theory of Anglo-Saxon civilisation, from which our own is derived. At the root of the English system of primogeniture, with its ban on the subdivision of landed

property, lies the purpose to promote the social longevity of family trees by a sufficiency of annual income. Our ancestors, deeming a practice which tended to impoverish all except the eldest son as incompatible with justice, rejected this principle from the start. At the same time they gave sanction to most of the other Anglo-Saxon devices for keeping capital intact for the benefit (or annoyance) of the next generation. The American who wishes to tie up his property so that his beneficiaries may enjoy the income but not the principal is free to do so, provided the period of restraint before it will vest in absolute possession does not exceed (according to legal jargon) "a life or lives in being and twenty-one years." In other words, he can always prevent his children and often his grandchildren from squandering his substance after

he is gone. The generation beyond this can make ducks and drakes of it if they choose, unless their own parents imitate his example and, exercising the power of appointment by will which he ordinarily throws them as a sop, start the tying-up process all over again.

What are the benefits of thus tying up property? What are its disadvantages? Does the practice inure in the long run to the welfare of the *cestui que trust* (who might better be described as the one not trusted) or does it hamper him (or her) unduly by paralysing initiative? Is it in most cases a wise precaution or does it chiefly cater to human vanity—the ambition of the accumulator to keep his name alive and defy the native saying that between shirt-sleeves and shirt-sleeves there are only three generations? Does it conflict with the new freedom or is the

tying-up process for protection of the individual a neat-handed Phyllis to the social democratic code?

It is pertinent to note by way of preface in this connection that the United States has gone Great Britain one better in the matter of protecting the well-to-do individual who does not see fit to pay his debts. One better or one worse, according as we choose to think. It is an axiom of American society that every tub is assumed to stand on its own bottom; and in conformity with this our tradespeople are wont to remind purchasers by a persistent "bill rendered" that monthly or at the most trimonthly settlements are a part of our moral code. On the other hand, all who buy clothes in England are familiar with the time-honoured prejudice of the English tailor against prompt payment. It violates usage;

he does not understand it and, detesting innovation, regards as unsophisticated any one who offers cash. Yet, nevertheless, the policy of obliging people to settle promptly by holding over their heads a social obligation, which could be enforced at law if needs be, met with a cropper when the Supreme Court of the land decided forty years ago that money given in trust for the support of a son for life could not be reached by his creditors, and thus played into the hands of the "idle rich." Moreover, the court sealed the doctrine by going out of its way to say that, whatever the English view to the contrary, this is the American policy. The learned justice who wrote the opinion, arguing that it was no new thing in any of the States of the Union to exempt from seizure on execution a debtor's tools or homestead, proceeded as that much-revered

student of the law, the late John C. Gray, pointed out, to "enable the children of rich men to live in debt and luxury at the same time."

In other words, it is un-American not to pay one's honest debts, but not un-American to tie up property so that one's children's creditors cannot get at it. Our courts have taken that view, or when they have attempted to modify the discrepancy by statute the remedy has been worse than the disease. For instance, the New York court, interpreting a statute which provided that the surplus of income given in trust beyond what is necessary for the education and support of the beneficiary shall be liable for his debts, took into account that the debtor was "a gentleman of high social standing, whose associations are chiefly with men of leisure, and who is connected with a

number of clubs." Commenting on this, Mr. Gray writes in the preface to his "Restraints on Alienation": "To say that whatever money is given to a man cannot be taken by his creditors is bad enough; at any rate, however, it is law for rich and poor alike; but to say that from a sum which creditors can reach, one man, who has lived simply and plainly, can deduct but a small sum, while a large sum may be deducted by another because he is of high social standing, etc. . . . is to descend to a depth of as shameless snobbishness as any into which the justice of a country was ever plunged."

Yet, as Mr. Gray goes on to say, "dirt is only matter out of place; and what is a blot on the 'scutcheon of the common law may be a jewel in the crown of the social republic." It seems to be accepted theory in our country

to-day that tubs unable to stand on their own bottoms should be protected against themselves whether they be poor men forced to the wall or gilded youths with a propensity to squander. Weakness in any form appeals to the neat-handed Phyllis of democracy eager to supply "first aid to the wounded." *Laissez-faire* has given way to the doctrine that mortals must do what is good for them—what society thinks good for them. This is admirable when applied to delinquents—to the maimed, the halt, and the blind of the social order. It is of the essence of modern progress to deprive conspicuously unfit parents of the custody of their children, to segregate the feeble-minded and to take away from those who waste their substance so as to expose themselves to want the control of their affairs. On the continent of Europe, where our sys-

tem of tying up estates by elaborate trusts does not obtain, the machinery for safeguarding spendthrifts is more generally efficacious than here. But if we are to justify restraints on the vigorous and the self-reliant, it must be by a different set of arguments than those which convince us where the degenerate or the helpless are concerned. Yet it is still the tendency of men of property not to take a chance; they prefer to assume that their progeny will be a bad lot, and to hamper them collectively by obliging them to distinguish principal from income. Undoubtedly this is salutary for the black sheep of the family, but the point whether it is for the best interests of the other kind is perhaps debatable.

Tradition supplies abundant grounds for the practice, notwithstanding that the desire to found a noble family looms

far less large on the horizon of the American plutocrat than on that of his compeer across the water, where well-earned wealth in one generation may become the password to a title in the second. Yet our countrymen with fortunes to dispose of, both "malefactors of great wealth" and humbler testators who have accumulated a modicum of this world's goods are only human if they heed the desire, as they constantly do, to prevent the fruit of their sagacity, toil, and good luck from speedy dissipation. They want it to last, partly because of the difficulty in laying up money, and partly as a monument to themselves. They persuade themselves that they are fulfilling an obligation to posterity in requiring that it shall last as long as the law allows, and they expect their offspring to bless them for keeping the wolf from the door during

one generation if not a second. Moreover, there are bugaboos to strengthen this resolve, notably their sons-in-law. To the traditional testator about to make a will all sons-in-law, whether extant or prospective, are villains. He pictures them ruthlessly compelling his daughters to hand over their patrimony or wheedling them out of it and squandering it in riotous living or wildcat ventures. He might be induced to trust his sons—but his sons-in-law never! To leave his daughters at their mercy would be an arrant lack of discretion. And so, whatever else, he takes care to tie up their portions so tight as to be unavailable under all circumstances for debts of their husbands. This savours of conventional prudence, doubtless. But for every son-in-law thus frustrated there are assuredly many who would be as little apt as the

testator himself to make inroads on or imperil the portions of their wives. Men lose their heads under the stress of impending disaster, it is true, and wives at such moments are disposed to offer everything; and yet by the assumption that their daughters will wed lame ducks testators impose a handicap at the start on the large number of partnerships where freedom to exercise the united judgment of husband and wife in the use of property, by way of taking advantage of suitable opportunities for advancement, would far oftener prove a benefit than a detriment.

Besides, a part of the inherent prejudice against sons-in-law is derived from the old conception of matrimony as a status where women were expected to have no opinions and to follow a blind lead in all money matters. Now that there is a growing tendency among fem-

inine property-owners to familiarise themselves with their affairs and either to exercise active control over them or to intrust them to agents of their own choice, is not the likelihood of coercion or cajolement so appreciably less that daughters may fairly complain of wholesale discrimination in favour of their brothers? A wife stands on a somewhat different footing; she has had her day, or at least a part of it. Even in her case the haunting fear that she may wed again on the strength of an outright gift, or bequeath it to her next of kin instead of his—two terrible bogies—rarely merits the disparaging lack of confidence in the partner of a lifetime thereby displayed; nevertheless, it is perhaps inevitable and judicious that husbands with large estates at their disposal should continue to limit the share of their widows to a life

interest and select their own remainder men. A woman not required to alter her former method of living has little right to complain of want of generosity, unless she is cut off if she marries again; but the caution which prompts a parent or other testator to hedge the next generation's lives about with barbed-wire fences seems to overlook that life is a great adventure, the chief zest of which is liberty to learn by personal experience.

But what of the propensity to wanton extravagance apt to seize young men or women who suddenly come into great possessions? What, too, of the competencies that would be wasted by blithe, irresponsible spirits whom a restraining clause might have protected until after maturity to their everlasting comfort in later life? There would be some such catastrophes undoubtedly if

the departing generation ceased to draw so taut a rein on its successor; but, after all, society does not have to rely solely on trusts to fetter the indiscretions of youthful heirs. Suppose the worst (from the tying-up point of view) to happen: A multimillionaire dies unexpectedly at the height of his activities, and long before his time, intestate, leaving a widow and a bevy of minor children. What ensues? Chaos? Very far from it. There is a family council; the widow consults persons in whom she knows that he had confidence or on whom she relies, and administrators are selected. Frequently she is one of them. Ordinarily, especially if large affairs are involved, several years must elapse before the estate can be wound up, and preliminary to this guardians are appointed for all the children, none of whom can deal with property before

they attain their majority, which (except by statute) is twenty-one for both sexes. The widow owns one-third in her own right and the children the remainder. Sooner or later distribution of the estate among the several beneficiaries is requisite, but in the interval it will be managed by the administrators or other suitable representatives of those concerned. Finally, after everything is settled there will be apportionment according to law with no dead man's clutch upon it, and on the strength of this complete ownership the children will be free to live their own lives, set up establishments and steam-yachts, speculate wildly, marry chorus girls, and commit all or any of the other extravagances which the provident are apt to conjure up and become panic-stricken over when in a testamentary frame of mind. In other words, they

will be free to learn experience first-hand, whether it prove a spiritual blessing or only Dead Sea fruit.

Nothing so very disastrous in this intestacy except that it leaves the barnyard door ajar for the black sheep and lame ducks of the family, and thereby flies in the face of a tradition which prides itself on hampering everybody lest a few go miserably astray. After all, in the final analysis, the practice of tying up property for the lives of the next generation is based on implicit distrust of human nature, especially one's own flesh and blood, and an absence of humour, which prevents perception that if the objects of one's bounty are not fit to have riches, the sooner it leaves their hands and gets into some one else's, the better for society. The lack of humour is pardonable in parents and other near relatives; their reasoning, of

course, runs exactly counter to this. We can scarcely expect it to be otherwise, and consequently even cynics applaud precautions taken to segregate the shares of kinsmen already labelled defective—the feeble-minded, the vicious, and those who have made a signal mess of things. But what is the especial merit of punishing an entire brood because of the possible delinquencies of unascertained individuals? Does not closing the door of the barnyard tend to paralyse initiative, diminish energy, and generate a false atmosphere of social importance, the distinguishing cackle of which is "We would like to get out but we can't, and so let's put on airs." If the toll of those spoiled for world service by being left a competency in trust were set off against those who came into their own only to squander it, over which should we be disposed to shed the most tears?

But, I hear some estimable and puzzled if not shocked people say: "Many beneficiaries would prefer to have others look after their property; most, whatever their other merits, are not qualified to do so, and there is a body in the community with especial qualifications for the task, the professional trustees." Before replying, let me qualify my sympathy with the power to spend as a tonic to character to this extent: not only do individual cases demand exceptional treatment, but no one could reasonably quarrel with a discretion that would postpone complete ownership in most cases to the age of twenty-five or thirty, a period at which the second generation is apt to show signs of steadying down, rather than relinquish it at the bare limit of twenty-one. As for disinclination to care for property, it is not feasible to build on this, because of the host of

agents, attorneys, men of affairs—call them what you will—waiting with their mouths open for just such choice morsels. The fallacy lies in the failure to distinguish that under the tying-up system the beneficiary has no power of selection and no option as to whether he or she wishes to take charge of the inheritance or not. An agent picked by the absolute owner of property is to all intents as responsible as a trustee named by a testator, with the advantage that there is a string attached to the employment which can be twitched if the association prove unsatisfactory.

As for the class with peculiar qualifications, it is axiomatic that training and experience should count in the management of invested wealth, and unquestionably they do. For the sake of security some testators select a trust company in preference to an individual

on the theory that it cannot abscond. This is all very well from the point of view of safety, but in many instances the tenant for life has to put up with a low rate of income, for the corporation is so intent on preserving the principal —the corpus, as it is called—for its own protection that it is apt to give posterity the benefit of most doubts. In these days of high prices and high taxes the special distributions, familiarly known as "rights," which accrue to stockholders from time to time often come in handy. A trustee is bound to deal with these perquisites according to law, and it is often a fine point whether he may then pay over as income or must add them to the principal. Where property has been intrusted to an agent no such distinction exists except as a matter of judicious handling, and it rests solely with the owner whether to

treat them as spending-money or add them to capital.

If they do not prefer a corporation, it is the habit of testators to choose the most prudent and conservative persons of their acquaintance as the almoners of their restricted bounty and their choice is frequently justified, though those who were adepts when the will was written often became superannuated or fossilised before the termination of the trust. As a set-off to the anecdote illustrative of spendthrift tendencies with which this paper opened, I cite another that throws some light on the pitfalls dug by the spade of changing conditions for the conventionally cautious and conservative. Perhaps after reading it one may be disposed to conclude that where property interests in this country are concerned, it is not possible to define sound judgment or

to go to sleep profitably on any investment.

The testator in question, a bachelor, made a will shortly before his death some seven years ago in favour of two nieces, to whom he left seventy-five thousand dollars apiece in trust. Anticipation of income was forbidden, the corpus securely guarded from the recklessness or greed of future husbands, and the trustee chosen one of the salt of the earth, a God-fearing man and contemporary of the testator, noted for his integrity and conservatism. The property which the trustee took over consisted of gilt-edged stocks yielding not quite five per cent net, but tax-exempt, so that each of the girls could look forward to about three thousand dollars annually. What better could one ask? you say. Quite so; but one of these girls was wise in her generation

and one was foolish, and I leave it to you to decide which was which.

Their names were Jane and Dorothy, but, though sisters, their characters were very dissimilar. Jane was a model of amiability and reasonableness, but Dorothy was opinionated and flighty. Each was thrilled by her inheritance, but not a great many moons had waxed and waned before Dorothy began to cause trouble. She was on the eve of marriage, and she got it into her head that the trust fund did not yield sufficient income. Possibly the young man to whom she was engaged put her up to it. Whether this was true I am uninformed, but I know that Mr. Waters, the trustee, believed so. Dorothy retaliated by applying the epithet "back number" freely to Mr. Waters when out of his hearing, and by inquiring if there was no way of

getting rid of him and substituting some one more "up-to-date," though be it said that Mr. Waters was only just sixty and well preserved.

It is not material to give the details of Dorothy's ungrateful conduct; suffice it that in the end her cantankerous animadversions so worked on Mr. Waters's sensibilities that he consented to resign. He regarded his decision as weak, but he was weary of being perpetually harassed by the cavillings of this misguided beneficiary—so unlike her serene sister. But he remained firm on one point—he would not consent to the appointment of Dorothy's adviser, who was now her husband, as his successor. He compromised finally, however, by agreeing on a "disinterested person" of their selection—a man against whom he knew nothing prejudicial, and about fifteen

years his junior—just to keep the peace. This was shortly before the outbreak of the present European war, and one inducement to Mr. Waters's consent was the disagreeable consciousness that several of the gilt-edged securities belonging to the trust had been misbehaving—shrinking in value for no apparent cause, and in one or two cases threatening to pass their dividends. Their misbehaviour gave just enough semblance of justification to Dorothy's eagerness for a change.

Mr. Post, the new trustee, entered on his duties, informing Dorothy in answer to her hope for a larger return that he was "a believer in new values"—whatever this might mean. It happened that the reasonable Jane married about this time and reassured by Mr. Waters that the loss of income on her share would in his opinion be merely

temporary, went to live in another city. Consequently the sisters met but seldom and ceased to be in close touch with each other's concerns. Three years elapsed; then one day Jane was distressed by the receipt of a letter from Dorothy announcing that Mr. Post had suddenly gone insane—"stark, staring mad," so it read, "and there is reason to believe that he has been out of his head for some time. All his affairs are in confusion and we are uncertain where we stand." As Jane had been hankering to ask her own trustee some searching questions, her sister's tribulation jibed with her own needs and she hastened to her native city.

A week of excitement, uncertainty, and revelation ensued, after which, to make a long story short, an accounting was required of the respective trustees. The exhibit thus made—the account of

Mr. Post, the insane man, being rendered by his legal guardian—was highly edifying. Taking Mr. Waters's figures first, the gilt-edged securities that he had received from his testator appear with their inventoried, then with their present market, value as follows:

	Inventory value	Market value
100 N. Y., N. H. & H. R. R....	$18,000	$2,500*
100 Fitchburg R. R., Pref.....	13,500	5,500
50 Boston & Albany R. R....	12,000	7,500
50 Boston & Maine R. R.....	8,000	1,250*
50 Old Colony R. R.....	10,000	5,000
50 Conn. River R. R.....	13,500	6,000
	$75,000	$27,750

* Dividends suspended.

Before submitting Mr. Post's figures (as rendered by his legal guardian) it should be said that from the outset of hostilities he had been known to expatiate excitedly in private on the cheapness of all American industrials having to do with the Great War. This idea

evidently went to his head and may be regarded as the first stage in his dreadful malady. It appears that immediately after his appointment as trustee he sold all the securities handed over to him by his predecessor, and assumed an initial loss of about fifteen thousand dollars; then he plunged in; otherwise the schedule explains itself.

	Inventory value	Market value
100 Cuban American Sugar..	$5,000	$20,000
100 Bethlehem Steel.....	7,500	60,000
100 General Motors.....	9,000	80,000
100 Studebaker Corp.....	10,500	16,000
100 Amer. Coal Products....	9,500	16,000
100 Texas Company.....	12,000	24,000
100 South Porto Rico Sugar.	6,000	22,000
	$59,500	$238,000

Of course the guardian by consent of court had already reduced to cash his entire holdings, much to the joy of the flighty Dorothy, who could not refrain from whispering to her husband while

still within earshot of the conservative Mr. Waters: "To think of being distanced by an insane man! Wouldn't that jar you?" In other words, the value of the conservative trustee's investments had shrunk from $75,000 to $27,750, and that of his rival risen from $59,750 to $238,000.

As they say in the vernacular, Can you beat it? The anecdote, if not literally true, might very well be. *Se non è vero, è ben trovato.* The moral would seem to be that the values of yesterday not infrequently become the scrap-heaps of to-morrow. Perhaps from this point of view there are grounds for the conclusion that the younger generation, where their own interests are at stake, are quite as apt to be wide-awake and discerning as the sagacious individuals selected by their grandfathers.

III

PERILS OF WILL-MAKING

III

PERILS OF WILL-MAKING

In the preceding paper I challenged the wisdom of hampering the next generation, except in the case of the palpably incompetent, by limiting the enjoyment of property to income for life. Outright ownership, especially to Anglo-Saxon minds, is a precious privilege which we covet for ourselves yet accord cautiously to others. From the dunghill of absolute possession the owner of property used to crow it over the world by virtue of an inherent right to complete control during life, and power to fix its disposition after death, restricted only by the law against perpetuities. A generation ago the word "inherent"

was sacrosanct in this connection and solemnly coupled with "inviolable." It was an axiom of our society that proud man dwelling under free institutions could do as he chose with his own and that it remained his own under all conditions. The French law might prescribe if it would that where there were children or parents (ascendants or descendants), a testator could will away only a certain portion of his estate; but the English-speaking peoples have prided themselves on the right to disinherit children absolutely, provided they made a reference in the will to show Tom, Dick, or Harry that they were not forgotten; and hence the origin of the phrase "cutting off with a shilling." The only exception was in the case of a wife; the law would step in and provide for her if her husband did not; but otherwise, assuming that the only cer-

tainties in life are taxes and death, the free-born American used to feel that if he paid the one and set his house in order for the other, his position was impregnable.

The first shock to his serenity came in the form of a new interpretation of "taxes." He had thought of them as money paid for the privilege of domicile in his community and of being protected, with occasional extra levies in case of war; he had associated them with living but never with dying, and he took umbrage at first at the notion that a dead man could be taxed. The United States was among the last of the civilised nations to sanction the doctrine of inheritance taxes; at a time when most countries, including Great Britain, had become habituated to it, our legislatures still harboured distrust. I remember saying to a judge of a high-

est (State) court that a progressive inheritance tax was one of the most equitable forms of taxation, and receiving an answer which not only conveyed dissent, but "after this the deluge." Yet to-day it is one of the commonplaces of our social machinery. When legislation did come it came with a rush; our separate communities, having assimilated the formula that the power of transmitting and receiving by will or descent property on the death of the owner is a privilege which is taxable, vied with each other in adopting this shearing process. Nor was the wind tempered to the shorn lamb; it blew upon him from various quarters, and frequently from several at once. Indeed, so fast and furious became the competition in this new source of revenue that even the great and conservative State of New York insisted for a

time on slicing off 25 per cent from every million dollars bequeathed to a stranger to the blood, and terribly veracious tales were current of how with New York, New Jersey, and Kansas (for example) working simultaneously and overtime, and with a second death intervening, it was possible to deplete an estate valued at $2,000,000 a few months earlier to a melancholy $800,000.

This orgy could not last, but subsided presently and more moderate counsels prevailed. Public sentiment recognised that lack of legitimate expectancy on the part of a fortunate beneficiary was not a wholly valid reason for turning his pockets inside out. He should be made to pay for his good luck, but society could not afford to show its rapacity and envy to the extent of becoming a highwayman instead

of a toll-gatherer. It was recognised, too, that the practice of stopping a testator's widow, children, or kin at several turnstiles instead of one in order to collect a separate share of the same estate was paramount to crowding the mourners. Consequently it has come to pass that though lack of uniformity still exists, there is to-day a wide-spread tendency to exempt property which has already paid a tax of like character and amount in one jurisdiction from contribution in another. On the other hand, the belief of the transmitter of property by will that his ownership is absolute has gone by the board forever, for no modern principle is more firmly established than the power of society to impose inheritance taxes which increase proportionately both with the largeness of the estate and the beneficiary's remoteness in relationship.

Another inroad on absolute ownership is the inhibition against leaving property lying round loose indefinitely. It used to be assumed that any one could go wandering over the face of the globe without leaving an address and expect on his return to find his belongings just as they were when he disappeared, plus any windfalls by way of inheritance in the interval. The theory was that if he chose to vanish for an unconscionable time leaving money in the bank it was nobody's business except his own and nothing could be done about it. As a result innumerable funds continued to lie unclaimed in the savings-banks for long periods for lack of a visible owner, and the control over property of various kinds was suspended by the absence of people who had voluntarily or involuntarily strayed away, of whom all traces had been lost.

Our modern society has declined to put up with inconvenience and has altered the adage, "a rolling stone gathers no moss" to read that a rolling stone if it rolls too long is liable to find itself out of the running. The first solution attempted was to prescribe that those who took upon themselves to remain away an unreasonable time from the place where they had lived or left property did so at the risk of being declared officially dead and deprived of what they had left behind. This, though bold, was convincing if the wanderer never returned, but would prove highly awkward in case he were to appear in the flesh later to contest the truth of the pronouncement. Such a situation was the issue when the Supreme Court of the United States, in 1893, solemnly reaffirmed that no court has jurisdiction to declare a person dead who is

actually living and that letters of administration granted on this presumption are wholly void. At the same time no absentee should plume himself on this. It is also the law that if his mother were to die in his absence, the court having jurisdiction of her estate would have power to presume that he was dead, and in the event of his return, her administrator would be protected. The wanderer's only recourse would be against those who had received his share.

The second attempt at relief proved entirely successful, though by no means novel from a world point of view. In 1904 the Supreme Court of the United States prefaced its sanction of the doctrine that long absence from one's domicile will justify interference by the state with the remark: "It may not be doubted that the power to deal with

the estate of an absentee was recognised and exerted not only by the common law of Germany, but also by the codes of the various states of the continent of Europe." In short, it became only necessary to substitute "disappearance" for "death" in order to give the proper courts in our several States jurisdiction of the estates of absentees. It is now a widely established doctrine that, if an owner of property cannot be found, a receiver or caretaker may be appointed to take charge of it for the benefit of those who would be the owners but for him; and while as complete provision as is practicable for the reestablishment of the rights and possession of the absentee on his reappearance is always made, he is liable to lose it altogether by "unreasonable" absence. In 1911 the supreme court of the nation sustained the constitutionality of a

State statute which authorised the distribution of an estate to others after a disappearance of fourteen years, holding that "constitutional law like other mortal contrivances has to take some chances of inflicting injustice in extraordinary cases."

Apart from inheritance taxes, the chief encroachment on complete power of disposition by will lies in the possibility that a testator's intentions may be set utterly at naught by the specious instrument of compromise, and this though the desire to ascertain and effectuate the real wishes of the dead instead of frustrating them is, as I shall presently indicate, a salient tendency of modern justice. A will admitted unqualifiedly to probate remains an object of veneration by the courts; but you must first catch your hare. In the limbo between death and probate dead

men can be proved conclusively to have no rights if the legatees under the instrument and the disgruntled heirs at law get together and decide to patch up their differences. Provided everybody consents and is competent to consent and no injustice is done to the living, the courts will give validity to an agreement in variance of the contested document, on the theory that people should be allowed to do what they chose with their own. To be sure, the law punctiliously insists that the will be admitted to probate, but to be carried out not according to its own terms but to those of the instrument of compromise, a ceremonial suggestive of baring one's head at a grave that has been rifled by body-snatchers. Yet the principle itself, of compromising a disputed will, although it impinges on the imagined security of solemn preparations for

death, has won the sanction of hardy common sense and become another limitation on the power of absolute disposal.

Yet, despite these encroachments, the right to regulate what shall be done with one's property after death remains substantially intact, and this, too, notwithstanding the popular impression that the intention of testators is very easily frustrated. It is a current belief, which derives colour from the sensational contests of which we read in the newspapers, that a great many wills are broken. But, though the attacks of disappointed or greedy relatives are numerous, the contrary is true according to the records of the largest county of the State with which I am most familiar and where predatory tendencies against testators are well developed. These records show a steady average of rather

less than one per cent of wills disallowed during the last ten years, a result which is made more remarkable by the reminder that some of these were set aside because of defective attestation instead of the mental incapacity and undue influence of the maker ordinarily urged by the rapacious. The statistics for the same period show a yearly average of less than one per cent of wills compromised—that is where the legatees and next of kin agreed to split their differences with the sanction of the court. These figures, which are undoubtedly indicative of conditions elsewhere, reveal a disposition on the part of juries to uphold the validity of legal testaments and tend to contradict the notion of the man in the street that his last wishes are apt to be disregarded.

It is rather surprising, however, that the showing on the side of validity

should be so good, considering the haphazard and hasty, if not sloppy, execution of so many wills. Instead of regarding the making of a will as one of the most solemn of ceremonials, the man in the street, if not the capitalist, is constantly taking foolish chances, as if he conceived it to be a privilege of democracy to be able to make a will in "any old way" and have it stand. This is not the place to compare the merits of notarial wills, which obtain in the Latin countries and French Canada, with Anglo-Saxon testamentary procedure. But it may be pointed out at least that a notarial will is a deliberate ceremony before one especially trained for the function, who retains the instrument in his possession and reproduces it after death with all the presumption of his official status in its favour. In Great Britain and the United

States the imperative requirements are the signing or acknowledgment of his signature by the testator in the presence of witnesses—at present two in England and here either two or three, as the State law happens to specify, who must subscribe their names in his presence and attest the instrument after he has affixed his signature thereto. An inherent veneration for parchment and red tape still keeps the English testator chary of intrusting the preparation of his will to any one but his legal adviser; but in this country the disinclination of many people to make a will until obliged to, coupled with the idea that nearly every one can make a will at a pinch, leads to a lot of hasty and casual execution which not infrequently results in disaster.

Indeed, it may be said that one of the modern functions of courts of pro-

bate is to adjust the requirements of the existing law to the well-meant but inept looseness of those who make wills or whose wills are made without suitable preparation. Our legislatures are constantly being asked to let down the bars a little further because of some more or less pathetic instance of inability to get by, due to failure to comply with existing requirements. For after all, slight as the ceremony is, when it comes to the final test the law must be inexorable. If the requisites are not performed, the will becomes waste paper, and the only issue left is whether out of sympathy for ignorance the law can by legislation reduce still further its demands without encouraging fraud or chaos.

Three concrete cases from a single recent volume of one of the State reports will illustrate the perils to which

those who make wills are exposed, the last of which will also furnish a good example of archaism which has outlived its usefulness. In the first instance the testator's will was disallowed because he concealed his signature from the attesting witnesses. All he did was to exhibit to them a paper folded so that they could not see his name and ask them to sign their names. He had a few days before asked them if they would sign his will. It was held that there was subscription but no attestation and the statute required both—the court saying: "It follows that when the deceased hides from the subscribing witnesses the signature which is upon the instrument previously signed by him and goes no further than to ask the subscribing witnesses to sign the paper placed before them, even if that request be accompanied by a statement that the

paper is his will, there is no acknowledgment by the deceased of his signature and so no valid attestation of his signature by the subscribing witnesses."

The second came near being a case of too many cooks. The testator, a man of means who was ill and had a lawyer at his elbow, was advised while waiting for the attesting witnesses to earmark the pages of his will by writing his name on the margin of each with the exception of the last. This he did and at this point the lawyer left the room. On the arrival of the witnesses the testator was about to sign in the proper place—between the in-testimonium and attestation clauses—when his nurse stopped him and instead he wrote his name in the margin of the last page. The attestation clause was then subscribed by the witnesses. After their departure the lawyer returned and said:

"You have not signed at the foot of the will." To this the testator replied that the nurse had said the directions were that he was to sign in the margin. When he heard that this was a mistake the testator exclaimed, "This looks sloppy, doesn't it?" and started to sign in the proper place. The lawyer advised him not to and suggested making a clean copy, but the testator declared that he wished to finish the matter that day. Accordingly he was told that if he insisted upon writing his name in the proper place the attesting witnesses should be brought back so as to be able to say how his name got at the bottom as well as on the side. The lawyer then added, "before I do call them, do you intend that (pointing to the margin) as your signature to this will?" To this the testator said, "Yes," and thereupon the witnesses returned and the testator

wrote his name in the proper place, but the attesting witnesses did not again subscribe the will. The contestants requested the court to rule that the testator when he wrote in the margin did not intend his signature to be operative as an execution of the will, but the judge said that it was for the jury to decide whether he so intended it as a final signature, and the jury very sensibly replied in the affirmative. Still it was a close shave from intestacy.

In the third instance a will otherwise valid was disallowed because it contained a bequest of $300 to a church on the condition that it be applied to the reduction of the mortgage on the church property and an attesting witness to the will was one of the guarantors of the mortgage. This, too, although the value of the mortgaged property greatly exceeded the amount of the note. The

decision was impregnable from the legal point of view, being based on the venerable statutory requirement that all the three witnesses be "competent," or "credible," and the consequent deduction that any one having a direct private pecuniary interest in anything which would pass under the will was incompetent, but it must sound tenuous if not repugnant to a layman. At common law a person was disqualified from testifying in courts of justice by mental imbecility, crime, or self-interest. The discrimination relative to interest was based on the theory that a person pecuniarily benefited would commit perjury. On the same theory a will could not be admitted to probate if the husband or wife of a legatee was one of the requisite number of witnesses; but this special ban has been generally modified in the United States to the extent of

providing that the will shall stand but the legacy be void. Eighty years ago it became the law of England that a will shall not be invalid by reason of the incompetency of any attesting witness who is not disqualified by insufficiency of understanding. Yet conservative tradition in alliance with defective tinkering of the statutes combined to produce in one of the oldest and most enlightened States of the Union the unfortunate consequence just cited.

The forms prescribed for the execution of wills are framed for the protection of those making them, and the witnesses have been aptly described as "a body-guard surrounding the testator" to circumvent fraud and collusion. Yet the changing spirit of human society with its repugnance to the thwarting of genuine wishes by mere technicalities is on its mettle to seek in the

interest of erring mortals whether this or that testamentary requirement is not superfluous; and modern courts, applying a kindred frame of mind to their problems, are disposed to stretch the law in their endeavours to effectuate a manifest purpose. On the other hand, the abolition of all forms would be a premium on chicanery and a standing invitation to chaos. Perhaps there is no inherent reason except tradition and obvious sequence why the validity of a will should remain dependent on whether the witnesses sign after or before the testator; yet if this concession were made to ignorance which fails to realise that the law requires attestation of the testator's signature, it would only be a short step to asking legal sanction for the convenient yet fatal habit of altering wills after execution, indulged in especially by old ladies who

are fond of tucking into the vacant spaces left by incautious scriveners or inserting between the lines the various changes and afterthoughts concerning their possessions which occur to them. Nothing is more dangerous than tampering with one's will and nothing more uncertain in its consequences; the law reports abound in cases which show results utterly at variance with the intention of the tamperer. Yet democracy is prone to ask pathetically and with some surface show of reason: Must we send for a lawyer and have the will re-executed every time we wish to make a change, when it would seem so simple to scratch out Jane and substitute Emily in case we are out of conceit with Jane?

Perhaps democracy would do better to rely on the growing inclination of courts to further the testator's purpose

at the expense of mere ceremonial than to make further concessions to sloppiness by relaxing the requisites. As I suggested earlier in this paper, there has been a manifest change in the attitude of tribunals in this respect; in construing legal phraseology the current paramount consideration is to ascertain by the light of the surrounding circumstances and the language of the entire instrument what the maker really meant and to give effect to it if possible. If one argue that this was always true in theory, the answer is that the rigidity of doctrinary formulas was a constant impediment to the judicial desire for justice. These serve less and less as an inhibition to-day when righteous common sense demands a more elastic interpretation. Two recent concrete instances taken almost at random from the same jurisdiction already

quoted will bring this out more clearly and furnish the disposer of property a concluding assurance that, whatever his other woes, he has friends at court in a literal sense.

A woman from the Middle West whom we will designate for our purpose as Mary Jones, "well educated, intelligent, and self-reliant," and about to go to Europe, sat down to draw her own will in the city of the port from which she was sailing. She proceeded to fill out the local blank she had procured by writing in the exordium or opening paragraph: "Be it remembered that I, Mary Jones, of—" (and here she struck out the printed specification of the foreign State, substituting the city and State of her own domicile)—"being of sound and disposing mind," etc. Next she filled in the blank space provided for the body of the will with some

twenty different bequests and then the spaces in the in-testimonium and attestation clauses. Every word not in print was in her own handwriting. After this she approached three acquaintances to whom she showed the document, declaring it to be her will and asking them to sign as witnesses. In no other way did she mention her signature or call it to their attention. They signed and the instrument was deposited in her safety-deposit box, where it remained until her death. There was no doubt that Mary Jones supposed she had made a valid will; but had she? Where was her signature? Certainly not at the end where it properly belonged. A rock-ribbed tribunal would have been apt to say that she had forgotten or failed to sign her name; but a judge of the highest court decided that her name which she wrote in the

exordium or opening paragraph was meant by her as a signature and to stand as her signature to the will when completed—a conclusion with which his associates agreed on appeal to the full bench. They emphasised in their opinion that the testatrix was exceptionally intelligent, but perhaps this tribute was more properly the due of their colleague. At all events, the will was admitted to probate; whereas it is probable that twenty-five years ago a court would have set it aside with an expression of regret at the necessity.

A woman whose nearest relatives were a married, childless son, and three grandchildren, two of whom were daughters of a deceased daughter, and the other the son of a deceased son, gave these instructions, among others, to the lawyer employed to draw her

will: a certain hundred shares of stock were given to an individual in trust to pay the net income to her son for his life, then to the son's wife for her life, and on the death of the survivors to pay over the one hundred shares themselves "to my three grandchildren." So it was claimed at least, but when the will was produced in court the words "to my three grandchildren" read "to their three children." This was nonsense on the face of it, for the son and his wife had no children, as the testatrix well knew. The truth was that the lawyer's stenographer had made the error in copying the will, and no one had detected it. A layman would be apt to ask—but if this was so, why not prove it and make the substitution? Because under the established rule of law that oral evidence is not admissible to alter the plain meaning of

written language, the court could not permit itself to know what had happened. All the circumstances attendant on the testatrix might be shown—including the number of her children and grandchildren—but the stenographer's blunder could not be introduced except *sub rosa;* the judges were not supposed to be aware of it.

Realising that they were in an awkward fix, the attorneys for the grandchildren brought a bill in equity to "remould" the will; but the court made short work of this, saying that the written instrument is the final and unalterable expression of the purpose of the testator; that the power of the court is limited to interpretation and construction, but it cannot make a new will; and that to reform the will upon evidence produced after death would open the door for fraud to substitute ulterior

designs for the expressed intent of a testator. Thereupon, the court proceeded to interpret and construe the will on its face as if in complete ignorance of the unfortunate mistake, though painfully aware of it. And after conference five of the seven judges came to the conclusion that the phraseology "to their three children" just as they stood imparted an unmistakable intent to give the shares at the expiration of the life estate to her, the testatrix's, three grandchildren. They pointed out that she knew her son and his wife had no children; that she had three grandchildren, of all of whom she was fond; and that children of her son and his wife would of necessity be her own grandchildren. Arguing from this that the words "their three children" were meaningless for the reason that the son had no children, they

treated them as an abbreviated paraphrase, which should really read "my three grandchildren, the children of my son and his wife," on the ground that the testatrix knew they were an unavoidable part of the description. Having arrived at this result, they struck out the words "the children of my son and his wife" as inapt and superfluous, which they had a perfect right to do under the rules of law, with the result that the residuum left was "my three grandchildren," the very words which the careless stenographer had deleted —a most happy coincidence, especially as the tribunal was presumed to be unaware of what had happened.

It should be added that the two other justices composing the court filed a vigorous dissenting opinion in which they contended that it was "not permissible to read into the instrument

words descriptive of those who are to take as legatees predicated on words found there, and then, on extraneous facts, read out the original words, and give the property to persons not within its provisions as admitted to probate." The decision of the majority in any given jurisdiction settles the law for the time being, but the argument against it in this case illustrates well the ingenuity which modern courts will have recourse to in order to obviate gross injustice. Every one will feel glad that the grandchildren received their legacy, whether they are convinced by the reasoning or not. What better evidence could one have than the two examples elaborated that the worst enemies of the disposers of property are not the idiosyncrasies of the law but their own or their agents' aptitude to make mistakes?

IV

FEMINISM IN FICTION AND REAL LIFE

IV

FEMINISM IN FICTION AND REAL LIFE

WHAT will the woman of the future be like? What sort of person does she really aspire to become? After all, it is the vision of the future in the mind of every intelligent woman that is the most vital factor in her chronic restlessness. For she knows that the moulting process begun more than a generation ago is still incomplete; yet, realising that she has renounced the static condition of slave, drudge, parasite, or plaything, to which society according to her sphere in life condemned her, she is still a little at a loss as to what she has developed into and as to where she is coming out. On the

strength of her success in revolutionising society's pristine attitude towards her sex, she is experimenting with herself and with man—experimenting with a vengeance.

That is, she was when the great European war broke out. Prior to that cataclysm events all over the world, and especially in the United States, had been playing into her hands. It was an era when not the virtues but the failings of humanity were catered to—on the theory that the social justice of the past did not allow sufficiently for the inability of the mass, through lack of opportunity, to cope with temptation. The doctrine that it is undemocratic and hence unchristian to be hard on anybody was in the air, with the result that many standards of conduct were relaxed and various points of view embraced which hitherto would not have

been given house-room. There was never a more well-meaning period. Social uplift with an utter disrelish for precedents was its keynote, and if the leaders were women even more conspicuously than men it was because it seemed for a while as though the millennium was in sight by reason of the fervent impulse to eradicate those evils most obnoxious to feminine sensibilities—poverty, sexual vice, and the rule of physical force. The hope was cherished that the day was not far off when the creed of the brotherhood of man and sisterhood of woman as promulgated by American democracy would provide a living wage for everybody, abolish the double standard of sexual morals, and put an end to war. Not a few believed that they might live to see a world or at least a nation eternally at peace, safeguarded from intoxi-

cants and debauchery, and with not a fly in a shop-window where food was exposed for sale.

No wonder the vision was alluring, even though the cynical murmured that life would become an interminable afternoon tea; we all of us fell more or less under its glamour, and were ready to admit that remarkable progress had been made in a very short time. And then out of a clear sky—or now that we look back a very murky one—came the dynamic European tragedy deluging the world with blood, a contest unparalleled in the numbers engaged, the deadliness of the projectiles, and the inhumanity of at least one of the participants. In the twinkling of an eye we seemed to have gone back a hundred years; then Europe was an armed camp, yet scarcely so ruthless; and our vision to be the very stuff of which

dreams are made, for the golden youth of the world were in the trenches, and all the energies, latterly so restless, of womankind had become focussed on the old-fashioned duties of mothering, nursing, comforting, and bearing her load of sorrow. Force—brute masculine force—was in the saddle again, and the hushed statistics of this carnival of blood and fire attested once more the price which women have invariably paid as inhabitants of an invaded country.

While the war lasted our souls were so racked that the world looked topsy turvy and nothing real except grim courage and the power of munitions. But with the advent of peace, society is already reverting to the problems which seemed to sanguine feminine minds nearly solved. Yet in the light of what has occurred, should not wom-

an, and especially the American woman, feel sobered and a little less positive that she has discovered the path to the millennium? At least it is an appropriate time for her to pause and think: to summarise the progress she has made, to examine the grievances of which she still complains, and to define her real hopes for the future.

One must assume a certain amount of sympathy. The point of view of those to whom the word "feminism" is chronically irritating because they are satisfied with woman as she used to be, and as they choose to believe she still is, rivals in futility that of the malcontents who would cure the shortcomings of democracy by reimposing a property test. The repugnance in either case comes too late. The position of the modern woman is parallel to that of the automobile; we meet her at every turn

and, whether we like her or not, if we get in the way we are likely to be run over. Sexagenarians can remember when it was the first duty of a woman to sit at home and do fancy-work until she was asked in marriage. Now even the conservative take for granted her right to make the most of her own life, as the phrase is, in some bread-winning occupation. Indeed, the pendulum has swung so far that the daughter who stays at home to tend the old folk is apt to think she makes a sacrifice.

As to the wrongs which have not been redressed and the rights, if we except the power to vote, which will so soon be hers, what are they? I speak of equality before the statute laws. In my native State, Massachusetts, at least, she stands on a complete parity with man as regards her person, her

property, and her children. Under the law as it read when I came to the bar the father was the natural guardian of the minor children; now very properly both parents share the right in common, and neither has more power of control than the other. But even under the old law the inequality was one of form rather than substance, for, if discord arose, the courts almost invariably gave the custody of a child of tender years to the mother, unless she had forfeited the right by meretricious conduct. To-day one hears it urged by feminists of a certain type that a wife should not be deprived of her child for mere infidelity. It is indissolubly hers because she gave birth to it—such is the plea. But this is parenthetical. Woman has suffered so much in the past from oppression that it is not unnatural she should think of herself as

still oppressed. The law is merely crystallised public sentiment, and this country still contains too many men, not all of them recent emigrants, who treat their wives as vassals, especially in money matters, doling out to them a niggardly pittance which is never paid until prodded out of them. The Turks still require, I believe, for the proof of a will two witnesses if both are men and three if one is a woman. It took a long time to persuade the English conscience, either lay or clerical, that it was inequitable to grant a divorce for infidelity to a husband and yet refuse one to a wife unless she could prove that her lord and master's transgression was coupled with cruel and abusive treatment or was so flagrant as to be termed notorious. She was expected to bear her cross with becoming resignation, lest the foundations of the family be

imperilled. Yet reverence for the adage that an Englishman's house is his castle succumbed in the end to the democratic doctrine that what is sauce for the goose should be sauce for the gander.

Nevertheless, public opinion all over the civilised world has been busy for half a century in levelling the discriminations of the statute law against the physically weaker sex. I do not mean that the process of amelioration is complete any more than I mean that in every State of the Union the equality of the sexes is established so thoroughly as in Massachusetts. But it would be surplusage to submit proofs that woman's battle is already won and mainly by her own initiative, or to demonstrate that what remains to be done in the way of correcting discrimination is chiefly a matter of detail and on the eve of accomplishment. I make one

reservation, let me hasten to add, so as to anticipate the same stricture from a score of feminine voices; but even this is a matter of lax administration rather than of positive inequality. I refer to offences against chastity. Somehow the woman continues to be haled into court, while the man slips through the net in which they both were taken. I was assured the other day by an engaging feminist at dinner that a woman in New York had been sent to the penitentiary for six years for having stolen two dollars from a man with whom she was too intimate. While expressing utter disbelief in the authenticity of the story, I agreed that it was sorry justice.

But after noting this exception, it is safe to assert that the woman who pauses to think has to-day little cause to complain of being penalised on ac-

count of her sex, and least of all in these United States, where she is indulged as no other women in the world have ever been. Who are the chief beneficiaries of our liberal divorce laws? More than two-thirds of the libellants are women, and, as every one familiar with the subject knows, we far outdistance in the number of divorces granted annually every nation on the globe with the single exception of the Japanese. I am not among those who regard liberal divorce laws as an evil; the point I am making is that frequent divorce and the emancipation of woman have gone hand in hand. It was her continuous knocking that caused the doors of legislation to open wide, and it was her refusal to put up with intolerable conditions that has made her such a frequent petitioner at the bar of social justice. It is chiefly because it

relieves women from the unhappiness caused by some form of masculine abuse that the remedy of divorce has such a firm hold on the conscience of democracy.

And yet, with this knowledge available—that in the eye of the law men and women stand on an equality—it could not be said that at the time the war broke out there was any abatement in feminine restlessness. On the contrary, woman's demeanour, as she stood with the remnants of her chains clanking about her heels, suggested one who had seen a vision and been exalted. Far from being satisfied with having altered the written law, she thrilled at the prospect of being able to modify that whole body of public opinion known as the unwritten law or social conventions. Here is the modern battle-ground. She reasoned that men

having managed the world hitherto, and in the main made a mess of it, the time had come for her to try her hand. The vision was world-wide, but here its appeal was especially entrancing, for it has been a favourite claim of critics as well as our own countrywomen that the American man does not count for much æsthetically. No wonder that, with all the modern facilities for swinging great bodies of women into line, it seemed possible to her to train her big guns so effectually on social conditions that (for instance) illegitimate children would inherit from their fathers as well as their mothers, although the number of women preferring spinsterhood to matrimony would, owing to financial independence, be constantly increasing. When these rosy expectations were at their prime the Great War brought its reminder that in at-

tempting to cope with human nature she had undertaken a larger task than she had anticipated.

While this desire on the part of woman to alter the unwritten law is world-wide, her perspective varies according to nationality. It is well to remind any audience of American women, at the risk of displeasing, that as intellectual companions to their husbands they are apt to be far inferior to their Gallic sisters, who aim to look at life from the same angle as the men they marry in the interest of an equal mental partnership. French husbands and wives play together much more sympathetically than ours for the reason that they more frequently have tastes in common and view existence through the same lens. The wife's ruling motive is to retain her hold on her husband's fancy. If he were to be-

come indifferent, it would be partly her fault (so at least she automatically reasons), and she must not fail to keep herself attractive. She recognises that if she bores him she is lost; consequently she is ever on the qui vive to keep up with him; and with all her audacities she never forgets that she is feminine.

The national theory of the American marriage is that it is a mating of kindred souls. Yet in numerous cases the American husband has the appearance of lagging behind or his wife of soaring ahead, according as one chooses to put it. It has long been axiomatic that the American wife felicitates herself on her superiority to her husband, though she refrains from telling him so. On the other hand, the American business man has ever been accused of sacrificing his wife on the altar of his own absorption

in money-making, and of salving the wounds due to his neglect with the ointment of unlimited credit. This is not the moment to inquire who is the more to blame. My purpose is merely to point out that despite the devotion which each takes for granted the American husband and wife are far too apt to neglect "team-work." They do not think about the same things, and largely for the reason that the wife after child-bearing is over prefers her own tastes to those which might render her a factor in her husband's advancement. The vast majority of American wives make no deliberate contribution to their husbands' fortunes. If we seek a reason why they do not cultivate more telepathy, it may be found in their taking for granted that their husbands will not bolt, but go plodding on, and the American husband gener-

ally does. He is universally known as the most docile husband on earth. Instead of emulating her French sister, the American woman has succeeded in throwing the burden of worrying, if either is to worry, on man. Her position is that he bores her at his peril, and that he must provide for her lavishly or she will be disappointed, a reversal of sex emphasis which seems to be partly indigenous and not wholly to be laid at the door of democracy.

When we turn to England, we recognise that the antics of the militant suffragettes, which seemed so obnoxious to many of us, were the expression of a deeper revolt than mere resentment at the denial of "Votes for Women." After centuries of standing third or fourth best—for Tennyson's lines "somewhat better than his dog, a little dearer than his horse" were not

unduly bitter—the Englishwoman has been vouchsafed some of the privileges long withheld by law and discountenanced by tradition. Accustomed as she was from infancy to be the echo of masculine opinion; if married, to subordinate her inclinations to her husband's will; if single, to follow the narrow ruts prescribed as womanly, pinching herself to promote the careers of her brothers, and condemned to joyless parochial tasks in the name of spiritual contentment, was it strange that she should drink so deeply of the wine of liberty as to become a little auto-intoxicated? The ferment in her brain represented the protest of ages, with the result that the eddies (or perhaps we should say whirlpools) of advanced feminism in England to-day foster a breed of women who claim the privilege of sowing their wild oats and, if

we may credit a recent writer in *The Atlantic*, would reserve to a wife the privilege of abandoning the father of her child whenever he has ceased to be companionable.

Conventional preconception of the German wife and mother dovetail rather closely with the experiences of the heroine of "The Pastor's Wife" (by the author of "Elizabeth and Her German Garden"), whose uxorious husband was at a loss to understand why she found the marital régime so uncongenial that she broke down under it. We are often assured that the modern German *Frau* glories in her sex life and has no ambition to extend her kingdom beyond the three K's which long have bound it. In a book entitled "Feminism in Germany and Scandinavia," published within a few years, the American author, Katharine Anthony,

says in her preface: "For want of adequate accounts and specific reports of feminist activities abroad, there is a mistaken impression that the German woman still sleeps silently in a home-spun cocoon. . . . This impression is due to our meagre knowledge. English translations of the literature of Continental feminism are few and almost the only foreign echoes which have gained currency in this country are obviously misrepresentative—such as what the German Emperor regards as woman's sphere, what the German Empress thinks of woman-suffrage, and what Schopenhauer has written against the sex." An extract or two from the book itself will indicate the movement made popular by the writings of the Swedish author, Ellen Key, and of the Scandinavian, Frau Ruth Bré, whose ambition it is to equalise il-

legitimate children before the law and give every child two parents. "For certain historical reasons which need not be discussed here the feminist movement of England has developed along other lines than the feminist movement of Continental Europe. . . . The difference is brought out in the two most famous slogans of twentieth-century feminism. These are the English slogan, 'Votes for Women,' and the German slogan, 'Mutterschutz.' . . . 'The protection of motherhood' is a colourless transcription of 'Mutterschutz,' and no possible combination of German words can give the note of hastening solidarity that rings to-day in 'Votes for Women.' . . . The extreme feminists of both groups have pushed on into fields of controversy which have estranged the more conservative spirits of their own ranks, but

which have nevertheless been the logical outgrowth of the self-same faith. The feminism of the English-speaking countries has culminated in the militancy of the English suffragettes, and the feminism of the German-speaking countries has culminated in the literary propaganda—much abused but little understood in this country—for a 'new morality' (Die Neue Ethik)."

Though the angle of approach varies with nationality, it is upon the unwritten law or the body of social conventions that feminine attention is now focussed. The attention of women in all lands is centred on endeavours to modify popular opinion as to what they ought to do, say, or think. Up to a certain point society has been no laggard in showing sympathy. Who longer demurs that women come and go unattended, simulate men's hats and

coats so far as they can without disillusioning the beholder, carry latch-keys, have their separate clubs and separate bank-accounts, read everything under the sun, and discuss almost everything with nearly everybody? These are but random symbols of liberties galore which the world's changing temper has granted almost by acclamation. The barriers to individual freedom are down and progress virtually unimpeded until we reach the firing-line, that battle-ground of contemporary life and modern fiction—the obligations of husbands and wives towards each other and the world's attitude towards single women who choose to be a law unto themselves. When women talk of inequality to-day it will generally be found (apart from the ballot) that what they have in mind involves the sex relation.

Three-quarters of the plays and half of the novels written during the last twenty years have dealt with one or the other of these themes, which have become more or less intermingled because of a lurking growth in the feminine mind that maternity is a right and that the sex relation may be casual without detriment to the eternal scheme of things. A number of years ago a clergyman now deceased told me of a visit from a prepossessing but respectable-appearing young woman who asked him to take charge of her bank-book. She was going to the hospital; if she did not survive he was to use the money for the baby's benefit. In the course of conversation it appeared that she was self-supporting and single, but loved children and had longed to have a child; that acting on this impulse she had picked out the man of her acquain-

tance who pleased her best and lived with him until sure of what she desired. She had left him then and never seen him since. For the benefit of the curious it may be added that a few weeks later she reappeared and claimed her bank-book. If we approach the situation from an opposite angle, no end of women formerly married for a home. Now an increasing number look askance at matrimony from behind the counter of an earning power sufficient to supply an able-bodied and not too extravagant spinster with all the necessities and some of the luxuries. Henri Bordeaux's novel, "*La Peur de Vivre*," depicts the dangers of soul timidity — a preference for the shallows and lagoons of life to the mighty deep with all its transports and its perils. What am I offered in exchange for my liberty? is the first question

the self-supporting modern woman puts to herself. Some men are brutes, and comparative poverty jars on one accustomed to the snugness of an apartment where art and thrift or comfort and social service walk hand in hand. But this power to choose may prove a two-edged sword if brandished solely in the interest of "safety first," as the example of maternal craving just cited suggests. The modern woman who turns her back on matrimony unless it promises dividends of eighty to one hundred per cent must perforce atrophy her natural instincts unless she can exact some concession from a sympathetic world.

Is the day coming when women will reserve as one of the conditions of marriage the right to break away later without the loss of self-respect or social prestige? The signs are multiplying

that this is what she is after. Chief among them is the alteration in the world's attitude towards the woman who has "erred." We all know what it used to be—social ostracism; and that the penalty was fixed by other women. Consider the change of sentiment. As we look back we might almost describe the last quarter of a century as the golden age of the heroine of irregular life. How many a dramatist and novelist of this period has devoted his wits to trying to rehabilitate her. It is a long remove from the copious yet crocodile tears that we shed at the death-bed of the Camille of our youth to the sophisticated apologies we make for her latter-day successors. In "The Second Mrs. Tanqueray," published in 1894, the chivalrous middle-aged hero takes as his second wife a beautiful woman of

twenty-seven with a notorious past, and you all know with what consequences. Yet it is with an undisguisedly mournful air that the dramatist, Pinero, reaches the conclusion that the venture did not justify itself; for he puts into the mouth of the irreproachable daughter who could not stomach her stepmother's personality, and was thus the moving cause of the catastrophe, "If I'd only been merciful!" as the closing tag of the play. Some time ago I attended the performance of an agreeable English comedy where the curtain descends on the mutual orthodox embraces of a sturdy recluse with scholarly tastes and an alluring female nomad whose shadowy past was so far glossed over that the audience, skilfully kept in the dark as to the exact nature of her indiscretions, went home feeling that it really

didn't matter much what they were, seeing that she was so attractive and he so satisfied. Unless closely examined "The Two Virtues," by Alfred Sutro, passes muster as a highly moral drama.

Those past middle life can remember when morganatic marriages were deemed the only pardonable variation from marital regularity; and that though a little puzzled we accepted the current excuse that sovereigns and the women whom they were forbidden to marry were in a special class. Then again we were taught to exonerate and even to extol George Eliot on the plea that much is forgiven to genius. Nowadays we lend so ready an ear to extenuating circumstances that it is almost unnecessary to devise excuses for anybody, in whatever class of life, especially if attractive. There is scarcely

a war heroine in contemporary English fiction of the serious sort who "let I dare not wait upon I would" in her relations with her lover, and not a single novelist who would think of apologising for her. I am not cavilling; I am merely reporting the general drift of public sentiment. Men never were especially severe on women for such shortcomings, though they drew the line at marrying them. It was their own sex which kept them social outcasts, and to their own sex is mainly due the more lenient attitude of the present day. The current popularity of the Bible text, "He that is without sin among you let him first cast a stone at her," is but the reflex of a feminine demand for more exact justice, which can be reduced to the query: "Why should the world be so much harder on women than on men?" Here, of

course, we are confronted by the fundamental facts of biology. But when one informs the advanced feminist that men and women never were alike and never will be, and that a creed which would fix exactly the same standards in sexual matters for both with the same penalties for their infraction would conflict with the laws of human nature, in the framing of which neither were consulted—she flares up and says she knows better. And so, as Henry James would have said, there you are. Not content with the compassion for and readiness to befriend the fallen woman which a sympathetic world has generated, the feminists would restore her social position into the bargain. Only they put their grievance this way: "If men do not lose caste by lack of chastity, why should women? They ought to stand or fall together." This is what

the modern woman has at the back of her mind when she talks of inequality.

When we turn to the reciprocal obligations of husbands and wives we find ourselves on the firing-line and facing the inquiry : "Where do we go from here?" I refer in the main not to the orthodox masses, but to the tendencies of those who claim to be leaders of thought. Who but a ninny would exchange the modern woman as she often is for the old-fashioned one as we are apt to imagine her? It being woman's nature—ponder the word—to be sweet and charming, compassionate, self-sacrificing, loving, and tender-hearted, who can regard her exchange of docility for self-reliance, and an outlook limited by her garden-wall for the initiative which enables her to see the world as it really is as anything but a gain? There used to be dread in the days

of our grandmothers that the new woman would dress like man. A few women did and were nearly mobbed. So impressed, on the contrary, is the new woman with the importance of looking her best that she has at times during the present generation aped the fashion-plates of the demi-monde. When we compare the women we know with the portrait-galleries of the past the loss of mystery and cajoling helplessness is more than compensated for by their spirited independence and truer comradeship. Yet how that portrait-gallery holds us despite the old-fashioned aspect of the sitters! Evelina, Olivia, and Sophia Primrose, Belinda and Lady Delacour, Elizabeth Bennett and her immortally foolish mother, Fanny Price, Lucy Ashton, Dora Copperfield, Mrs. Nickleby, Amelia Sedley, Rosamond Vincy, and

Lily Dale—I chronicle almost at random. What a delightful coterie, yet how vibrant with the elements of weakness which the modern woman is taught to despise! Not an ounce of sophistication, as we now understand it, in the company. There were arrant yet charming geese among them, notably the two daughters of the Vicar of Wakefield and dear Dora Spenlow, who, judged by modern standards, scarcely knew enough to go in when it rained. Yet, while agreeing that if they had known more of life they would have been spared some very harassing experiences, are we not moved to think at times that the sophisticated woman of our day knows too much for her own happiness?

You will recall that David Copperfield, after his aunt Betsy Trotwood lost her money, goes to tell Dora, and

release her, if she wishes, from her engagement. "'How can you ask me anything so foolish?' pouted Dora. 'Love a beggar!' 'Dora, my own dearest,' said I, 'I am a beggar!' 'How can you be such a silly thing,' replied Dora, slapping my hand, 'as to sit there, telling such stories? I'll make Jip bite you! I declare I'll make Jip bite you,' said Dora, shaking her curls, 'if you are so ridiculous!' But I looked so serious that Dora left off shaking her curls, and laid her trembling little hand upon my shoulder, and first looked scared and anxious and then began to cry."

Whoever reads the entire scene will agree that no one could be more charmingly inconsequential and bewitchingly vapid. Yet if one were obliged to choose, I, as a mere man, should prefer to take my chances with Dora, assum-

ing that she was not merely a figment of Dickens's fertile brain, than with the very competent young woman whose letter to a woman's column of the newspaper I read the other day. "My husband stays at home evenings, reads, and smokes. He gives me fifteen dollars every Saturday to run the house, and expects me to do my own work. He earns four dollars per day. He has quite a bank-account for the children's education, and won't give me one cent over fifteen dollars except that in sickness he pays the doctor and the nurse. . . . I think he is unfair. When I married him I was well dressed and belonged to several clubs, but now I am asked to give up my clubs. I think he ought to give me five dollars a week to do the work and be able to dress like other well-dressed women."

This correspondent, who signed her-

self "One Who Wed While Love Lasts," a thoroughly modern *nom de guerre*, wrote to inquire if she would be justified in leaving her husband. Read in parallel columns, does poor Dora's prattle sound less incredible than this epistle? Of course, Dora Spenlow and "One Who Wed While Love Lasts" belong to different social classes; but the essence of this modern wife's demand is that she should be kept beautiful and amused on penalty of revolt. Her state of mind is akin to that of other working men's wives, who write to inquire if it is not reasonable that their husbands, who go to work fairly early, should prepare their own breakfasts—one of the bones of domestic contention most frequently aired in public. Yet, as we all know, the housewife has more time on her hands than ever before, thanks to the blessings of electricity,

cold storage, and her ability to buy ready-made all sorts of things which her predecessor had to manufacture or go without. Even the kitchen of the working man's wife is a paradise compared with what it used to be; and it is fortunate that the "movies" should have been discovered just at the moment when she has leisure enough to enjoy them.

Turning from concrete reality to the portrait-gallery of contemporary fiction, who are the successors to the list of obsolete heroines just enumerated? We should expect to find inspiring examples of what woman would be now that she has so nearly entered into her own; and, if progress and charm go hand in hand, the very latest type ought to be the most engagingly representative. Deliberate contributions are not lacking; indeed, the novelists vied

with one another in depicting her as she was just before the war broke out. We need not dwell on the meritorious heroines of that middle period when woman's cause still hung in the balance and writers were moved to level their scorn at the prejudices that denied woman brains and the right to think, or rankly discriminated against her. Dorothea Brooke, Tess of the d'Urbervilles, Esther Waters, Marcella—to cite a few offhand—were women trying to shake off the shackles of sex or who were mercilessly pilloried. They had as a contemporary one Daisy Miller, the frank and artlessly poised young woman who walked out of Mr. James's inner consciousness into the limelight and demonstrated to an astonished Europe that an American could paddle her canoe on any river and yet remain irreproachable. Alert as

she was and attractive as she was, her personality like a shellacked surface radiated piquancy rather than charm; and undoubtedly her distinguished author had his tongue in his cheek in offering her as a national asset for cosmopolitan scrutiny. Yet as we look back at her to-day does she not seem almost old-fashioned, and her audacity primness when we compare her with her British successor of a quarter of a century later, the emancipated Ann Veronica? In Ann we have the very stuff of which the new woman's dreams are fashioned, if we are to credit her creator, a would-be psychologist as well as gifted novelist. On the river where Daisy Miller paddled there were no rapids, and, if there had been, she would have skilfully avoided them by wading ashore; but in her successor's case not to take the plunge was to re-

fuse to live, and her sponsor would have us believe, when we finally behold her in the slacker water below the falls, a bedraggled, miry figure, clinging to her overturned canoe with one hand and waving to the spectators with the other, that she had "made good" and distanced her less enterprising sisters.

Do you remember the edifying tale? The heroine with whom we were fain to sympathise in the earlier stages of her struggle for liberty rounds up her career by throwing herself into the arms of a minor professor of biology who not only had a wife but who gave Ann Veronica to understand in the most unvarnished terms that he was already steeped in licentiousness. Their honeymoon, if it may so be called, was passed in Switzerland, where amid the rare atmosphere of the mountain peaks each was transfigured in the other's

eyes so as to seem blameless. Not long after their return to England the professor's undivorced wife dies and we leave the happy pair making overtures towards social recognition. Young girls devoured the book freely when it was published, and, though there were murmurs of disgust here and there, the reading public accepted it, as it has accepted the author's later books, as a study in social progress piquing to the curiosity. "Who knows," they said to themselves, "but this may be the coming woman?"

Her creator, who stands in the front rank of contemporary novelists, and whom many regard as a searching interpreter of social life, is evidently sure she is and has taken pains to say so. I admire Mr. Wells's art. I gratefully acknowledge the interest of his novels and his ability to create real

characters. Nor do I seek to impugn his philosophy; to do so would be begging the question; I am merely putting him in the witness-box—using his own dogmas and his own creations as evidence of his belief and hope that the enlightened normal woman of the future will consort with man whenever and for so long as she likes, and leave him for some one else in case she tires of him. It will be "up to" him to keep her steady; and the license of course would be reciprocal, insuring individual constancy only so long as love lasted on both sides. When I inquired the other evening of an agreeable and not too sophisticated lady if we were coming to this, her reply was "surely," and when I asked her how often people would separate before they were content, she said "not more than once or twice," and the answer seemed

to satisfy her completely. So there you are.

In "The New Machiavelli," on page 238, we find Mr. Wells the philosopher and social seer moralising as follows, and many modern women doubtless have read the passage with supreme satisfaction: "After two generations of confused and experimental revolt it grows clear to modern women that a conscious, deliberate motherhood and mothering is their special function in the state, and that a personal subordination to an individual man with an unlimited power of control over this intimate and supreme duty is a degradation. . . . I confess myself altogether feminist. I want this coddling and browbeating of women to cease. . . . I want to see them citizens with a marriage law framed primarily for them and for their protection and the

good of the race, and not for men's satisfaction. I want to see them bearing and rearing good children in the state as a generously rewarded public duty and service, choosing their husbands freely and discerningly, and in no way enslaved by or subordinated to the men they have chosen. The social consciousness of women seems to me an unworked, an almost untouched, mine of wealth for the constructive purpose of the world. I want to change the respective values of the family group altogether, and make the home indeed the women's kingdom and the mother the owner and responsible guardian of the children."

Fine words butter no parsnips, and the proof of the pudding is in the eating. We have a chance before the end of the book to see a practical working out of these theories, the net conse-

quence of which is another case of hero and heroine going over the falls together. Isabel Rivers, who does not appear upon the scene until after the middle of the four hundred and ninety pages, becomes so essential to the hero that he abandons his intelligent if not very interesting wife, who has shared and sought to embellish his fortunes, and here is their dialogue on the eve of eloping: "We have made a mess of things, Isabel—or things have made a mess of us. I don't know which. Our flags are in the mud, anyhow. It's too late to save those other things! They have to go. You can't make terms with defeat. I thought it was Margaret needed me most. But it's you. And I need you. I didn't think of that either. I haven't a doubt left in the world now. We've got to leave everything rather than to leave each other.

I'm sure of it. But we have gone so far, we've got to go right down to earth and begin again. . . . Dear, I *want* disgrace with you."

The italics are Mr. Wells's, not mine. It would be easy to offer abundant evidence to substantiate that this is the drift. I have put Mr. Wells in the witness-box partly because he is so well known and is in a literary sense authoritative, and partly because he is a protagonist in social progress and high priest of feminism. What he says is regarded as expert testimony by a public which includes a host of women and the people who prefer fiction which makes them think. He makes no secret of his own evolutionary aspirations for the sex of which he is an outspoken champion.

The evolutionary forces pay precious little heed to current morals or individ-

ual preferences. The sanction of one age is often the anathema of its predecessor. Yet, talking of heroines, it is pertinent to wonder whether democracy can find no better cure for social injustice than to crown the woman of unstable virtue as a symbol of enlightenment—crown her in the name of individual liberty, nicknamed "the great adventure," with the assurance that all the rest are cowards. To those old-fashioned enough to believe that woman at her best should be not merely charming to the eye and senses so far as nature gives her grace, but spiritually also, so that she serves as an anchor in the storms of life—the new doctrine, which ignores the immutable laws of human nature, seems to invite the ironic laughter of the gods. Yet advanced feminism was more than half-ready to set this newer type of heroine

on a pedestal at the moment when the tremendous war convulsed society. If the noble spirit and the self-sacrificing efficiency shown by all classes of women during the last four years are the world's best promise of her development now that the conflict is over, it has seemed well, nevertheless, to indicate what certain leaders were planning for her when their activities were interrupted.

V

DOMESTIC RELATIONS AND THE CHILD

V

DOMESTIC RELATIONS AND THE CHILD

Not long ago a petition for the adoption of an infant was presented in court. Of the three people who stood before me, all of whom were over forty, one was a man, two were women, and as I looked them over I noticed the sweet dignity of the elder woman's expression. The other was of coarser grain, and the male in the human triangle—for it turned out to be a triangle—who must have been close on fifty-five, was of nondescript aspect, a little shop-worn, though fairly well-to-do. I supposed it to be the ordinary case of childless parents seeking to adopt a single woman's

infant. On questioning them I discovered the man to be the father of the child by the other woman, and that his wife, she of the fine countenance, was applying with him for leave to adopt the waif of the illicit relation. Under the law the adoption would not be valid unless she joined in the petition.

Mistrusting my own ears I looked at the wife inquiringly only to hear: "Yes, I've decided that it's best. We've no children, and the baby will be better off. She can't afford to look after it." Terse and pitifully to the point. Here the dialogue ceased, for the culprits, already familiar with the programme, were merely awaiting my sanction. As I signed the decree I said to myself that compared with this wife Chaucer's patient Griselda seemed an amateur. Instead of leaving her husband to his evil devices and the child to its fate, she had

taken the proof of his sin to her arms. A woman friend to whom I mentioned the episode replied: "Well, of course, she had ceased to care for her husband."

This seemed not unlikely, and yet, penetrating as was the truly feminine comment, I found it superficial. Nevertheless, as if to bear out my friend's implication that such magnanimity was incompatible with matrimonial self-respect, a pleasant-faced young woman came before me a few weeks later with the request that I permit some worthy strangers to adopt her baby, and in response to my inquiry why she wished to part with it, answered: "I'm married now and we have another at home, and, though my husband knows and has paid for the board of the first, he prefers I shouldn't keep it. These people have had it ever since I married." Yet until the girl became explicit it had been on

the tip of my tongue to suggest that if I talked to her husband he might change his mind, and this because his unwillingness somehow jarred on me from being so exceptional. Or, to put this a little differently, my memory held such a long file of husbands ready to embrace the full consequences of their wives' mistakes before marriage that I had become hardened (or shall I not say softened?) to the knowledge that they were apt to do so.

The contrast between the two cases serves as a peg on which to hang the skein of argument—a skein tangled, nevertheless, by the crisscross of changing social currents. It happened that the first person (also a woman) to whom I spoke of the second incident, remarked: "I'm not surprised that the husband didn't care to support another man's child born out of wedlock." The

obvious answer was that in my official consciousness it was the exceptional husband who demurred. Being a nice person, she shook her head, an equivalent to saying that in a similar plight it would be too much to expect. Unquestionably it used to be—and not very long ago—the convention that the innocent child must suffer and the maternal tie be severed in order to avoid condoning sin or trampling on conjugal proprietary rights. A half-century back the conduct of the modern Griselda just instanced would have seemed so quixotic as almost to merit reprobation. If to-day we admire though marvel at the magnanimity, it is largely because of the change in society's sense of responsibility towards the child.

The consciousness of the courts differs from that of two other rival authorities or tests—that of the church and

that of the legislator. All these seek the same end, the welfare of humanity, but the angle of approach is quite dissimilar. The church prescribes from the point of view of its conception, based fundamentally on Holy Writ, of what men and women ought to be, the lawmaker from a yearning for immediate concrete change, but the function of the courts is to enforce and interpret existing laws. In this endeavour they are forbidden to overstep the bounds of existing law, that is, to legislate, but in so far as they fail to keep in touch with what mankind is thinking about, and to assimilate the temper of the age—growth of new ideas as distinguished from mere sporadic tendencies—they become disqualified to adapt existing laws to current human needs and aspirations.

Nowhere is this receptiveness to what

is going on—which with time becomes a rich consciousness—more essential than in the courts which have to do with domestic relations, where legal technicalities are largely subordinated with the sanction of precedent to the main issues involved. I remember hearing a critic of a candidate for the presidency say that he would make a pretty good probate judge. This damning with faint praise was meant to register the benevolent inexactness permitted to those who hold this judicial office. Yet if a wide and wise discretion is thus allowed and expected, it becomes inevitable that those who exercise its functions vigilantly should discover that certain public states of mind which strain old conventions exist and have to be reckoned with. This is merely a preliminary to the proposition that in the mirror of my judicial consciousness

reflecting the experience of over twenty-five years the child has acquired stature and the parent dwindled proportionately where the happiness or welfare of the one comes in conflict with that of the other; and correlatively that the woman "in trouble" has acquired a new rating.

To be sure, the stock of the latter has been going up steadily since the cast-iron days of the "Scarlet Letter," and so rapidly of late that if we are to credit the consciousness of the Wells, Galsworthy, Compton McKenzie school of fiction—and are they not in the forefront of the "serious" contemporary novelists of old England?—she has nearly touched par as a subject of human interest. Although Mr. Wells has recently discovered a God with his own peculiar hall-mark, he has yet to disclaim that he would not regard a

League of Nations braced by domestic continence as a menace to liberty if not contrary to nature; and even Arnold Bennett has strayed from the "Five Towns" in order to introduce us in London in war-time to "The Pretty Lady," with the apparent implication that not only are the "Colonel's lady and Judy O'Grady sisters under the skin," but that the underlying distinction between a countess and a street-walker is far to seek.

This consciousness of the novelists—and it could be matched over here—reflects the glare of the pavements and footlights. That of the courts which deal with domestic relations is derived from the slow round of drab and often pathetic situations shorn of all except sheer reality, though constantly yielding surprises. Yet my experience tallies with that of the novelists to the

point of admitting (if continuous data merit so pusillanimous a word) that the young woman "in trouble" and who wishes to "get out" by handing over the evidence of her "indiscretion" to some couple yearning for a child not infrequently shows little compunction at parting with her baby or little sense of concern at having one. Doubtless she feels more of both than the facial mask discloses, but I doubt if the very beneficent societies for girls who supply "first aid" to the erring would tell a different story, and it would seem as if shame in the old-fashioned sense was no longer to be taken for granted. I am not referring to the rounder whose presence in the criminal dock argues that she has become so inveterate in her habits as to be beyond the influence of altruism, but to the casual victim of misplaced confidence (to adopt a pre-

vailing euphemism). The freemasonry of women which once was so relentless that it applied the thumb-screw of torture to offenders against chastity without discrimination has happily been won to mercy; indeed so intensely and entirely so that what with helpful hands and bountiful hearts and all the compassionate ardour of scientific social service, it is possible to-day for a quizzical court to wonder whether random childbirth is from the point of view of a fresh start in life more of a handicap to a young woman than an operation for appendicitis. Certainly for one reason or another the moral aspect which used to separate the two misfortunes like a gulf has been considerably modified; and pressed by the economic problem, "How shall I manage with this new mouth to feed?" the mother finds it easy to transfer the burden to society,

which, impersonated by some childless couple on the lookout for just such a chance, frequently provides the only practical solution.

Between the child and the rival trio more or less at odds as to what is best for it—the parents (or parent), the charitable societies and institutions and benevolent relatives or other aspirants for custody—the consciousness of the courts stands like a buckler or windshield. The courts become the umpire if these clash. Why, for instance, when adoption of an illegitimate child is sought, should the mother be required to attend? In order that the judge may make sure that she is not being coerced into compliance, and that her readiness to part with her baby for good and all (if it be good) is genuine. It is easy to induce a woman under the stress of weakness and mortification

that "the best way out of it" is to hand over her new-born baby to people who offer a "good home," and that all she has to do is to sign the paper. Yet if this is permitted to suffice, the maternal instinct—the most precious in the world—is liable to be robbed of genuine choice, as more than one instance known to me would bear out. For the woods are full of people eager to adopt children—the number appearing to be on the increase—and it might be added that superfluous infants just now are much easier to be had than cases of champagne. The old prejudice against thrusting one's hands in a grab-bag, eugenically speaking, and breeding by proxy is in abeyance if not dying out. Parents who long for the joy of a child in the house are less apt to be deterred by the dread of atavism, and, arguing that environment and a good bringing-

up are quite as potent factors in the stability of a family tree as the influence of the original sap, are more ready to take a chance and brave the whisper of the neighbourhood, "A foundling! To think he may grow up and marry my daughter," a likely and horrible contingency. Naturally these would-be adoptive parents endeavour by means of the Binet and Wassermann tests and other methods of investigation to secure as flawless grafts as possible, and their inclination is to prevent the real parents from knowing who is to adopt the child or where it is to live, in order to forestall the possibility of later regrets or interference. This is a precaution on which those who make a business of discovering healthy infants for eligible couples like to insist if they can. The policy is debatable, but the practice in careful courts is to require the presence of all

parties at the same time. The hide-and-go-seek method of interviewing them separately or not at all derogates from the authority of the court by substituting another arbiter. Furthermore, it exposes the child to complete ignorance of and disassociation from its blood relatives in the event that the experiment works badly or the adoptive parents decease. In cases of guardianship or adoption where the issue is between vicious or improvident parents and a charitable society, it is often imperative for the child's sake to conceal its whereabouts lest formative influences be undermined or the patience of those providing a good home abused. In every instance involving custody, the paramount consideration, which might be termed the pole-star of precedent where a child is concerned, is—what is for its welfare or best interests?

The "best interests" of the child is a glib and appealing phrase, but less easy of exact interpretation than appears at first sight, and, pole-star as it is in the consciousness of the courts, it shades away in meaning every little while. It is commonly referred to as a modern doctrine, which, strictly speaking, it is. Yet we may fairly assume that the English judges who for centuries habitually awarded children to the father rather than the mother when the parents could not agree, held the belief that they were benefiting the child no less than the father by recognising his traditional title to custody. The ancient conception of the child as property, with its consequence that the father must be little less than a monster to forfeit exclusive rights of guardianship, a doctrine which left the mother virtually in the lurch, died hard

in England, even if it is entirely extinct; but the courts of our several States almost universally repudiated from the outset the harshness of the English principle by awarding children of tender years to the mother, provided she was not very much to blame for the family discord, which usually meant meretricious, and this, too, though the statutes of most States constituted the father the natural guardian during wedlock. If this favouritism between the parents as to natural guardianship has not been done away with everywhere in this country, the date is not far distant when it will be. On the other hand, the attitude of the courts where parents battle over children has inclined so steadily towards the mother that, unless she has shown herself wanton or exceptionally recreant or heartless, she is not likely to be separated from them. In-

deed, the pendulum has swung so far in the opposite direction and the theory of paternal ownership been so completely discredited that the boot is sometimes found upon the other leg, and women are heard asserting that they own their children because they bore them, and ought under no circumstances to be deprived of them—a complete reversal of the original injustice. There is a woman who keeps writing to me just before Christmas: "When you sit down at table in your beautiful home with all your family around you, think of —— ——, whom you robbed of her only child, and whose heart you have broken." And yet this pathetic Banquo at the feast fails to spoil my appetite. Though I pity the poor mother, I think of the daughter who was removed from degrading surroundings before she had lost the chance to

grow up a self-respecting woman. In other words, mother-love, though set upon a pinnacle in the conscience of modern courts, must yield to a higher consideration, the well-being of her offspring. Where the custody of children is concerned, the only enemy which the modern woman has to fear is her own unfitness. This is more apt to be challenged by the social workers and charitable societies, who might be called liaison officers of the courts of domestic relations, than by masculine ill-will. The beneficent body-guard, who probe into and bring to the attention of the court the conditions which menace the child, serve as a buffer between it and maternal Bolshevism. But an assumption that the contest is one-sided or invariably simple would be far from correct. In its capacity as umpire the court will make sure that the child is

safeguarded, and yet not sacrificed to the indiscriminate zeal of the social worker. Remonstrance by the parents will not avail to prevent the feeble-minded offspring from being segregated and so afforded its only chance for social development; yet in dealing with normal children the consciousness of the court keeps the balance even by allowing no one to forget that a dinner of herbs with parental affection is preferable if consistent with safety to the stalled ox of the institution—or even the home provided by the institution. Rarely, however, do those who minister to the needs of neglected children fail to live up to the spirit of this creed in their recommendations or to give the benefit of reasonable doubt to parents ambitious for another chance. It should be said, too, that it is a part of the consciousness of modern courts that

these liaison officers of our social system, who are truly indispensable allies to justice, do not often trespass on one another's preserves or trample on one another's toes in religious matters. Rarely do their interests clash, because of an almost universal disposition to live in peace with their philanthropic neighbours, a course encouraged in some jurisdictions by statutes which prescribe that wards of the State shall be brought up in the religion of their parents.

When we turn from the semisubmerged to the every-day family, what human contests are fiercer than those which involve the custody of a child or children? And here the courts have to reckon not only with maternal love but with that of the grandmother. On the death of a young wife a man not infrequently decides to break up housekeeping and confide their child for the time

being to her mother—an eminently suitable arrangement. So far so good, but when two or three years later he decides to marry again, litigation is not uncommon, due to the refusal of the grandmother to part with it, and in her desperation (for otherwise she has not a leg to stand on) she is apt to try to prove that her late daughter's husband is a disreputable person if not a fiend in human shape—evidence which in the consciousness of the court is liable to be taken with a grain of salt. Yet other women often express sympathy for the grandmother—as if to say: "It may be the law, but it ought to be different." In a case where two deaf-mutes had married and the wife had died, the father intrusted the only child, who was free from defects congenitally in all respects, to his mother-in-law. Presently he decided to marry

again and his choice, oddly enough, was another deaf-mute, though capable and pleasing. He had a terrible time in recovering his baby, for there was nothing the grandmother and her other children, some of whom were deaf-mutes, some normal, did not allege against him, and the court-room was vibrant with sign-language, all the deaf-mutes in the community having gathered in his behalf. It was clearly a case of grandmother-love, but complicated for me by the puzzling consideration as to what effect living with two people who were deaf and dumb would have on a normal child; so much so that I required medical advice, which declared positively that the association would not be injurious, and so the father prevailed, although I have never felt absolutely sure that I was right.

It would be erroneous to assume that

being to her mother—an eminently suitable arrangement. So far so good, but when two or three years later he decides to marry again, litigation is not uncommon, due to the refusal of the grandmother to part with it, and in her desperation (for otherwise she has not a leg to stand on) she is apt to try to prove that her late daughter's husband is a disreputable person if not a fiend in human shape—evidence which in the consciousness of the court is liable to be taken with a grain of salt. Yet other women often express sympathy for the grandmother—as if to say: "It may be the law, but it ought to be different." In a case where two deaf-mutes had married and the wife had died, the father intrusted the only child, who was free from defects congenitally in all respects, to his mother-in-law. Presently he decided to marry

of miscegenation to consider. Would it be for the best interest of the child, who sooner or later must betray her origin, to stay where she was or be remanded to her coloured natural mother? I remember vividly the frantic solicitude of the foster-mother, who had obtained the child from a charitable home, at the possibility of losing her. The case finally hinged on disinterested testimony, which proved the real mother to be so unfit to bring up the child that, though once more I "saw through a glass darkly," I sent the foster-parents away rejoicing.

According to the National Census of 1906, over 72,000 divorces were granted in the United States. In the world census of 1900 this country stood second only to Japan, 55,000 divorces as against 93,000, with France and Germany showing less than 9,000 apiece.

These more or less familiar figures have just been supplemented (1919) by a Report of the National Census Bureau, from which it appears that the divorces in this country granted during the year 1916 had risen to 112,-036. They reveal an increasing and deplored but not necessarily evil tendency among our people to adjust their marital disagreements in the courts, a process which must be more or less heterogeneous in its mismating consequences until a national divorce law is passed, or diversity between the several States is cured by uniform legislation. This is not the occasion to discuss the ethical pros and cons of divorce, much less of remarriage. So far as the consciousness of the courts is concerned the issue is dead, for divorce, however reprehensible it may seem to some, represents a world-wide

and growing conviction of democracy that it is the best and often the only relief against "the infernal brutality of whatever name, and, be it crude or refined, which at times makes a hell of the holiest relations." Divorce is a surgical operation, with more or less social stigma attached; appendicitis, with the difference that the patient, though relieved, wears the earmark of having made a mess of things, and yet constantly the only escape from a living death.

Incidentally, a very considerable number of the divorces applied for involves the custody of children. It is to be borne in mind herewith that couples deterred by religious scruples from severing the marriage tie are permitted by the church without reproach to seek separate maintenance—the modern equivalent, though unilateral in

that it can only be brought by a wife, for the divorce *a mensa et thoro* of the old ecclesiastical courts as distinguished from a divorce from "the bonds of matrimony"—a proceeding that prescribes the terms on which warring couples are to live apart, yet leaves them still man and wife. This favourite and much-invoked modern expedient for all who believe in the literalness of "let not man put asunder" is granted commonly on somewhat less exigent grounds than would justify divorce pure and simple. Consequently, so far as the offspring are concerned, the consciousness of the courts has much the same problem to consider whether it be a case of pulling the tooth or killing the nerve. In each case the truly vital consideration for society is—how about the children?

The novelist, Edith Wharton, in her brilliant short story, "The Other Two,"

has etched with skilful irony the social consequences of easy divorce by letting the curtain fall on the wife serving afternoon tea to all three husbands, to the quizzical dismay of the last legal and fond possessor. It would be easy to match the unsavoury philandering with the marriage tie still more or less in vogue among the fashionable rich who happen to be vulgar by equally gross and increasingly pitiful realities in the descending social scale. On the other hand, it is scarcely too much to say that it often seems to the jaded consciousness of courts dealing with discordant domestic relations that Jack and Jill might better be allowed to go their separate ways except where there are children. The power to perpetuate the tie which holds together two utterly mismated lives pulling in opposite directions is a thankless privilege unless re-

deemed by considerations for the race. On the issue of preserving the family, an aim alike of the church, the lawgiver, and the courts, each from its own angle, it is significant that more than two-thirds of proceedings for divorce, and all for separate maintenance, are initiated by women. Modern divorce at its inception, though open to men, was designed primarily for the protection of wives from masculine tyranny, and the dire statistics which offend so many people have been in large measure a register of relief from intolerable conditions more or less sanctified by prior generations of patient Griseldas. Yet when we turn from the immediate past and look ahead, does not the established policy of modern courts (at least those in the United States) to vouchsafe complete protection to the wife, both as

concerns herself and custody of her children, unless her conduct has been outrageous, prompt the question whether responsibility for the preservation of the family will not rest henceforth largely on the attitude of woman?

To develop this, it is to-day practically possible for a wife to allow mere caprice or unsubstantial grievances to deprive her children of their father, and thus sacrifice their true welfare to her own egotism. No woman can be compelled to live under the same roof with her husband, and, if she leaves him, even "liking some one else better" may not prevent her from retaining the custody of young children, if all that appears on the surface is incompatibility. It would be incorrect to allege that the consciousness of the courts recognises

more than a drift in this direction; yet opportunity runs hand in glove with the temptation—one extenuated by the apostles of freedom who hold that marriage is "up" to a man, and that if he cannot retain his wife's affection she is justified in leaving him. This postulate of liberty, if not encouraged by current fiction, is to be read between its lines. Years ago, when a woman in whose favour I had decided whispered to the court officer as she went out, "Tell the judge he's a darling," I thought it not unlikely that I had been cajoled. Yet this was a mere error in psychology. When, on the other hand, only the other day a young woman (accompanied by her mother) tripped up to the bench to inquire if she could obtain a divorce or separate maintenance because her husband "smoked in bed," I was disposed to ask myself

whether the pendulum between the sexes had not swung so far the other way that the next patient Griselda would be a man.

VI

THE LIMITS OF FEMININE INDEPENDENCE

VI

THE LIMITS OF FEMININE INDEPENDENCE

"No more firing was heard at Brussels —the pursuit rolled miles away. Darkness came down on the field and city; and Amelia was praying for George, who was lying on his face dead, with a bullet through his heart." So it was written in "Vanity Fair," as everybody knows, and even the generation who "no longer read Thackeray" are familiar with Captain George Osborne's and Amelia Sedley's Georgian romance, which ended at Waterloo. Rather one-sided romance from the angle of the modern woman; yet vain fop and egotist as he figured, George Osborne was both brave and good-natured, breaking

with his purse-proud father in order to marry her—the most insipid, however estimable, heroine in fiction. When the world war began, the century since Waterloo was almost complete. Is not the contrast wrought by one hundred years in the size of armies and the deadliness of implements of warfare rivalled by that of the revolutionised relations between the sexes, especially husbands and wives? Indeed, if we could translate ourselves back to 1815, which would seem stranger, the tin-soldier aspect of the battle-fields or the monumental subserviency of woman?

Either contrast is striking enough, whichever way we decide, and either is so patent that to elaborate would be tiresome. "Why, then," I hear some champion of the old order demur, "single out as a prototype poor Amelia Sedley of all persons? She was so deadly

dull, so intolerably constant. One almost forgets whether she married big-hearted, ungainly, persevering Dobbin in the end or not, she took so long about it." Quite so; the only justification is that Amelia was a war-bride, and we hear so much of war-brides just now. She crossed to Flanders, too, not as a hospital nurse or canteen worker, but as a camp-follower, for the wives of the officers of the English army of occupation were allowed to accompany their husbands to Brussels. Was it the fashion of that day for girls to marry on briefest acquaintance the men going off to the wars, with only a week-end for a honeymoon before they sailed? Whether they did or not, they would have been ready to, for woman's nature has not changed, she has merely ceased to wear hobbles. I remember hearing in England in the summer of 1916, a lit-

tle under the rose as if a disillusionising phenomenon, that the widows of men killed at the front were marrying again. The psychology of this appeared to be something in the air, a by-product of the carnival of war, which, if apologised for at all, was tagged as woman's "bit," done because she was so sorry for the men. Dame Nature is never at a loss for devices by which to repair the ravages in population, but whatever the scientific key to this particular idiosyncrasy, no one would attempt to ascribe the superb devotion and self-sacrifice and the infinite tenderness of woman during the great war to a mating instinct. Moreover, her display of just these precious qualities has spiked forever the guns of defamers of either sex who wished us to believe that the new woman would renounce the old emotions which have made her, for eternally

contradictory reasons, not always clear to herself, the slave of man from the beginning of time. Out of the welter of world agony, and because of it, she emerges the same old ministering angel with the identical stock in trade. But henceforth she purposes to "wear her rue with a difference"; the war has demonstrated this if nothing else. She is demobilising, and though she may still don her emergency uniform, she is giving up or retiring with good grace from her emergency occupations. Her net social gain appears in her having broken in the course of four years no end of hobbles—hobbles both of body and soul, hobbles that she has thrown off forever. And the net gain resulting to man is that she still aspires to remain fundamentally what she was before. She recognises her inability to compete with him in physical strength and that

a feminine philosophy not animated by tenderness and self-sacrifice would make her utterly miserable.

If this be only another way of saying that she cannot help remaining what she is—the weaker vessel—she would rid the epithet of obloquy, not repudiate it. The new self-respect of woman is so far virile that it draws the line, and a hatpin or pistol, on sundry masculine privileges which used to be regarded, however mournfully, as part of her lot. When a woman testified before me in court the other day that her husband had dragged her round the room by the hair of her head, I looked at her, not with horror, but with a mixture of suspicion and incredulity, it sounded so old-fashioned. "Describe what happened," I said, and pressed her for particulars. The wife-beater is by no means obsolete even in this country,

but, except among the foreign-born and the lowest classes, he is a far less frequent figure in court than formerly, if only for the reason that his wife refuses to live with him on those terms. Indeed, the policy of marital brute force may be said to have become so discredited that courts, vigilant to protect proper victims, have to be a little inquisitive as to what really took place when wives seek separate support on the score of being pinched, slapped, or shoved. Nevertheless, as one ascends in the social scale an irascible flip in the face or pinch of the arm becomes no less intolerable than a vicious blow that really hurts, and husbands who indulge in the practice have only themselves to blame if their wives depart. Not only is the wife-beater on the wane, but that arch-enemy of domestic happiness, the male skinflint, who insists on holding

the purse-strings and administering them on the theory that his wife must ask for what she requires, needs far less to eat than he does, and that more than one dress or hat a year is vanity. It is, perhaps, still a part of the consciousness of sophisticated courts that chiefly at afternoon tea do women eat with gusto; but why elaborate the list of obvious male tyrants? Only the other day, as it were, woman's self-respect was so timorous, and her economic channel of escape from thraldom so undeveloped, that her reluctant appearance in court was tantamount to a certificate that she had suffered infernally. It was part of her creed that a nice woman will not litigate her conjugal troubles until her cup is running over. When she could endure no longer, she solved her self-respect by asking: "What else was I to do?" And a nice woman was rather

expected to endure dragging round by the hair of the head, provided her husband did not do it too often, and was what was termed "faithful to the marriage tie."

So much for yesterday. To-day faithfulness to the marriage tie in any spiritual sense excludes so many things which husbands used to do (and utter) with domestic impunity, that the law does not attempt to provide for them. Indeed, so zealous are both priest and lawmaker to preserve the institution we call the family, that the arbitrary tests which they impose for the guidance of nice people remain deliberately conservative. Most churches still forbid the remarriage of divorced persons, discountenance divorce except for flagrant infidelity, and are lukewarm as to that, and look askance at legal separations (which do not sever the marriage tie)

until the limit of human endurance has been reached. If the offence be nothing worse than constant invective (the various synonyms of harlot, for instance), or physical violence resulting from occasional as distinguished from chronic sprees, the sanction is apt to be accompanied by advice to stick it out a little longer. When we turn to the laws governing divorce and take as a text the proposed model statute urged by the State Commissions on uniform legislation, who, except from sheer religious scruples, will claim that adultery, habitual intoxication, conviction for crime (with imprisonment for at least two years), or wilful desertion (for two years) are causes too flimsy to justify the severance of the marriage tie if the injured party so elects? In this connection it is edifying to note that though national prohibition has been

ordained with such despatch that an agonised minority is agitating the establishment of floating saloons outside the three-mile limit, or a peripatetic cruiser, to be known as "Der Fliegende Holländer" (with apologies to Alice Brown's striking war-story, "The Flying Teuton"), only three States have thus far consented to subordinate local idiosyncrasies as to what should or should not justify divorce to a national consensus of opinion. This suggests a latent but unpatriotic distrust by the individual States of extraneous interference with what the most divorce-ridden people in creation except Japan are fond of styling the "sanctity of the home"; and yet a constitutional amendment that would prevent divorce in one State from resulting in bigamy or adultery in some or all of the others, would seem quite as imperative as the de-

thronement of John Barleycorn. But, however this may be, it is indisputable that the legal grounds for divorce in this country, when judged by the modern standard of what men or women have a right to expect of a partner for life, are, with rare exceptions, almost compulsory.

In other words, in this instance as in others, law defines the least, not the most, which the conscience of human society insists on. The statutes regulating crime cease to concern most of us individually for the reason that theft, embezzlement, and arson seem utterly remote from our social sphere. Similarly the likelihood of landing in the divorce court, though less inconceivable than standing in the dock, is associated in our minds with unpleasant or, at the best, very unlucky people. Just as the law sentences the house-

breaker but is powerless to deal with envy, hatred, and malice, and all uncharitableness, so the court of domestic relations will set free the wife of a dipsomaniac but turn an inexorably deaf ear to the plea of incompatibility. And yet the world over, and especially among nice people, the true test of wedded happiness, the test which breaks or binds, is ability to get along well together. While theoretically this has always been the test, it has become significantly so with the progress of woman's emancipation. Divorce laws at their inception were passed primarily for her benefit, and at least two-thirds of the proceedings for severance of the marriage tie and all proceedings for legal separation continue to emanate from her. Yet in order to be convinced that the inhibitions on conduct laid down by the statutes as safeguards to

wedlock are primitive when measured by the present standard of what marriage demands, it is only necessary to consider whether it seems strange that a woman, provided she has ceased to love, should try to cut loose from a spouse who beats her, gets drunk habitually, or commits serious crimes for which he is imprisoned. Would it not seem stranger if she continued to live with him? And the corollary to this is the inquiry: should the modern woman's love, deep-rooted though it be from instinct and tradition, be expected to survive such an ordeal? Unquestionably, between the barrier against masculine behaviour of this sort and the basis on which married couples purpose to live in a world made safe for democracy, there is a No Man's Land of tolerably wide dimensions.

What are the limits of this No Man's

Land? The so-called survival, notwithstanding she had been beaten assiduously, of the old-time woman's love was partly due to her inability to help herself. Apologists for the old-time order of things have been known to claim that she rather liked it. Nevertheless, in case she left her husband and carried off her children, he could recover them even though she disputed their possession in court, and all access to economic independence was closed to her. Unless she could make out a desperate case, she had to grin and bear it under the conjugal roof, or starve. It is not necessary to specify the avenues, one should perhaps say alleys, to income-producing employment open to women to-day, which, tortuous though they be, are widening and straightening out so rapidly that the menace of inability to make both ends meet, if she

departs, no longer confines the housewife as in a bag, with the strings drawn. Not only is the self-respecting woman freed to-day from marrying for purely economic reasons, but, if ill-treatment prove her matrimonial lot, she is often resourceful enough to be able to say to her husband: "I can stand it no longer, and can look after myself." In this event the children usually go with the wife unless she has been meretricious, and their father must support them (if not her) will he, nill he, which gives her the whip-hand even in a literal sense. So also will the courts prescribe if she is forced to appeal to them. In fact, from the angle of refusing to live with a man after he has become intolerable, nice women with any appreciable earning power are virtually protected to-day from airing their grievances in public; they have only to leave the key of the

flat under the door-mat and go. Indeed, so fast and so far has the pendulum of readjustment swung in her favour, that the crucial inquiry of the modern marital situation has come to be: at what point does a husband cease to be intolerable? Or to phrase it a little differently: how poor a sort of man is it a woman's duty to put up with?

The latest statistics of the National Census Bureau (1916) show for that year 1,050 marriages and 112 divorces to each 100,000 of the population; in other words, one divorce to every nine marriages, a considerable increase since the previous tabulation in the ratio of divorce to marriage in the United States. Over against these figures is to be set the judicial consciousness that eight women out of ten, provided their husbands are kind, affectionate, sober, and faithful, will stick to them through

thick and thin, because such is woman's nature, which, as I have already indicated, has blossomed afresh with buds of efficient tenderness in the forcing process of unconventionality occasioned by the war. And yet, especially among nice people, who would no more expect to become associated with the statutory causes for divorce (unless infidelity or desertion) than with shoplifting or arson, there has been a swift growth of the doctrine that it is incumbent on a man to retain his wife's affection, and that if he fails to do so he must not be surprised or unduly annoyed if she likes some one else better. This has been the prevalent note in Anglo-Saxon fiction for some time, especially and more openly in Great Britain, but also frequently here, the distinction being that the British heroine is apt to burn her bridges, whereas her American sister,

who has told her husband that she is tired of him and has become attached to another man, prefers to motor back to quasi-respectability over the causeway of a collusive divorce. Here is a tendency over which both the courts and the church have ordinarily little control. A husband was always free to leave his wife if ready to pay for the luxury of supporting her apart. Today the privilege is nearly reciprocal, for there is no bar except public opinion to prevent a wife from forsaking her husband if she can maintain herself or get some one else to maintain her, and, provided she mend her fences (sometimes even if she does not), public opinion, before condemning her, almost invariably inquires: why did she have to? Indeed, the radicals would persuade us that to be merely hopelessly bored by a man—out of conceit of his

countenance and sure before he speaks what he is going to say—is sufficient justification for a change, and that the marriage of the near future will be ethically dissoluble if a husband cannot pass the test of being plumbed to the depths and yet found interesting.

After discounting the audacities of fiction as a guide to the philosophy of wedlock, we must not ignore the residuum of truth responsible for this ferment—namely, that if men persist in their old methods, it will be more and more in the power of wives to get rid of them. But the economic power of woman to enforce this quasi-threat involves the gravest of responsibilities, for it makes the stability of the marriage tie largely dependent on her reasonableness as to what she has a right to require. The European theory of marriage, as every one knows, was

based on preserving the husk or shell of the family life at all costs, with the result that disaffected husbands and wives who endured each other in public and strayed on the sly were tolerated like the thief who returns goods on the assurance that no questions will be asked. The peccadilloes of the individual were winked at in order to preserve the social institution—to safeguard the rearing of children and the future of the race. Even clerical repugnance to the remarriage of divorced persons, though reinforced by holy writ, springs from the same theoretical loyalty to social order. What is to become of the world if the family perishes? What, indeed! And yet the growth of social justice has given the sanction of law to the severance of bonds which the victims of the past were expected to endure for the sake of

conscience, or to palliate, if at all, clandestinely, and this remedy has overspread the globe. Though designed for the relief of the individual—conspicuously the wife—it protects the social institution by serving notice that family life which is a festering sore precludes a suitable atmosphere for the children and helps perpetuate unendurable domestic standards.

It has already been pointed out in the paper "Domestic Relations and the Child" that responsibility for the well-being of children rests on women to a far greater extent than ever before, owing to the tendency of the courts in settling domestic disputes to make the wife their custodian, unless her conduct has been wanton. If a woman is free to pick up her baby and snap her fingers at her husband merely because she finds him less congenial than she ex-

pected, or, if there are no children and he palls on her, terminate their union to all intents and purposes by leaving a note on her pincushion and the wedding-ring pendant from the gas-fixture, it is obvious that she holds the holy state of matrimony in the hollow of her hand, to protect or to play fast and loose with as she elects. The inviolability of matrimony in the past was bulwarked by the plausible dogmas that, human beings being born to trouble as the sparks fly upward, it is the Christian duty of all, and especially of the weaker vessel, to bear whatever comes and not to expect too much, particularly from wedlock; and that in return for providing shelter and support a husband is entitled to certain prerogatives, euphemistically linked in the prayer-book by the words love, honour, and obey, which put his wife's susceptibili-

ties wholly at the mercy of his temperament. The church would still have wives believe that the sanctity of marriage forbids its dissolution for mere brutality enforced by a bludgeon or carving-knife; but so many women in the world refuse longer to subscribe to this tenet that we have in the United States (and to a considerable extent over the world) the anomaly of a great nation freely utilising divorce in opposition to a church militant but legislatively powerless. South Carolina abolished her divorce laws in 1878, but in which other of the United States would a bill repealing them or forbidding the remarriage of divorced persons have a ghost of a chance of passage? In which of the countries of Europe would not any change in the relief already provided by law for intolerable conditions be towards greater latitude rather than

restriction? This obviously puts a quietus on the theory that woman should be expected to endure matrimonial misery to the bitter end, but falls far short of a certificate that she ought not to be expected to endure anything. Civilisation by its laws has served notice on the church and all other social reactionaries that a wife is justified in expecting more of her husband than husbands were once ready to concede; but the consciousness of the courts detects a new social menace to-day in the propensity of some wives to expect too much.

This takes us back to the war-brides we left waiting on the pier, to whose theories of what returning husbands ought to be, the prototypes of a century ago, and George Osborne in particular, seem obsolete as the dinotherium. It may be that a scarcity of men will ar-

rest temporarily among the European nations decimated by war the trend of women to be less long-suffering, but the ethical inquiry: what is intolerable from a wifely point of view? is unobscured for American women by a shortage of supply. Nor can the heroes safely build upon the hysterical whisper: has woman left at home kept pace spiritually? for who can doubt it if doing without ungrudgingly and helping bountifully with tireless hands be the test. Yet the main problem bristles with conflicting points of give and take due to changes in standards many of which have been accelerated by war liberty. Husbands and wives will return to their boiled mutton, but never again on exactly the identical basis as before, either from an economic or domestic angle. Nevertheless, the world agony and stress of the past four years has served to set

once more in high light an old truth, one which, especially in the United States, was in danger of being lost sight of in the medley of other spiritual forces —namely, that man is a robust and a fighting animal. One of the effects of high-explosive carnage has been to emphasise the fundamental differences between the sexes which quasi-feministic propaganda had begun to discredit and confuse. When the tocsin sounded, they rushed to their preordained posts—the men to the trenches with their horrors of hell-fire and shell-shock, the women to the canteens and hospitals, even the ambulances and munitions works, or to the task of keeping home-fires burning and the pot a-boiling. In short, when overwhelming dangers threaten, society reverts automatically to primitive instincts and the habits of the tribe.

On this fundamental distinction between men and women which dictates to each sex its offices in the domestic partnership rests the stability of the family, a conception at the very root of the policy of both priest and lawmaker concerning it. Though their cast-iron dispositions have been greatly relaxed, they still hold fast because forged in nature's foundry, notwithstanding woman has lately demonstrated her capacity to perform at a pinch or from economic choice nearly all of man's work not requiring brute force or brute courage. How is the family to be preserved? Not surely by forbidding a wife to insist that the phrase "I sometimes take a glass of beer," the extenuating formula so often uttered in court, shall mean what it implies and not be a mere flimsy cloak to disguise the debaucheries of an habitual drunkard.

Not surely by perpetuating the already challenged code of secrecy, which conceals from wives the ailments of their husbands in the name of professional honour instead of segregating or earmarking all afflicted with the virulent poison that makes the glory of maternity a cross. The menace from these robust vices is obvious; but turn about is fair play. The tastes and reactions of men differ from those of women, and no legislation will ever make them the same. Against abuses arising from the first the law, as has been shown, affords ample relief and protection, but against the other only when they are glaring. This puts into the hands of woman a weapon which, if drawn capriciously or without great cause, imperils the preservation of the family no less surely than masculine tyranny or vice. It is a safeguard of the race that most

women realise this intuitively; yet there is a prevalent and would-be superior breed—one fostered by modern fiction—who claim the ethical right to leave their husbands, and thus conclude the marriage relation, on grounds so slender and flimsy as to mock at the valid grievances for which the divorce statutes provide redress. Dislike of household duties, distaste for cohabitation, disillusion with their lot, an uncurbed consciousness that they do or could like some one else better—this last most frequently and insistently urged, especially by those economically free, as the oriflamme of a new sex dispensation,—these are the threads in the woof of current social conditions of which courts are increasingly cognisant, but of which few statistics can be kept for the reason that the malcontents are answerable only to public opinion.

Against the view of the church, declaring the marriage tie indissoluble for any cause (except perhaps adultery), and that of the lawgiver, permitting it to be severed only for the weightiest reasons, is set the inchoate theory that it ought to cease to bind, so far as living together is concerned, from the hour when the sensibilities of the female are repelled by the conditions of the partnership. If this cannot be construed as license not to endure at all, it certainly constitutes her the sole judge of what she is expected to bear in the way of disappointment or dissatisfaction. Such a result, if widely sanctioned, would from the point of view of the family as we know it at present be only one step removed from a virtual nationalisation of husbands.

VII

MARRIAGE AND DIVORCE

VII

MARRIAGE AND DIVORCE

THAT there is urgent need of a uniform divorce law and even more of a uniform marriage law to reconcile the diversities of our several States seems to be generally admitted, and yet nothing dies harder in this country than local custom and prejudice concerning the legal formalities of matrimony and of its dissolution. Those familiar with the subject are virtually in accord that there is little likelihood of securing the passage of a national constitutional amendment, and are resting their hopes on the gradual influence of the commissions on uniform State laws established over twenty years ago. The commissioners appointed from the several States have

framed and recommended to the legislatures among other bills affecting all classes in the United States both a uniform marriage and a uniform divorce act, the former divided into two parts, a marriage license act approved by the conference of commissioners, August, 1911, and a marriage evasion act, approved August, 1912. Nevertheless, up to 1918 the marriage license act has been adopted in only two out of fifty-one States and Territories, the marriage evasion act in only five, and the uniform divorce act, approved 1907, in only three. In the summer of 1918 the uniform divorce act was subdivided by the conference of commissioners into two parts, one relating to practice and procedure, the other to annulment of marriage and to divorce. This is a pitiful showing from the point of view of readiness to subordinate community

sentiment to a carefully considered code that would unify the laws in their application to family life from the Atlantic to the Pacific.

To be sure, the attention of the United States has been centred on the World War since 1914, yet in the interim a crusade to establish national prohibition has been successful and numerous palliative measures in aid of social justice have been enacted. But when inquiry is made why so little has been done to obliterate the interstate confusion which makes a wife in one jurisdiction a concubine or bigamist in another, we are told in the words of the commissioners that the legislators report lack of public interest. "Sanctity of the home" is a favourite buttered phrase in the mouth of Americans. The taunt that we are the most divorce-ridden people in the universe except Japan

has been tempered by the certificate from the historian Lecky, "it is remarkable that this great facility of divorce should exist in a country which has long been conspicuous for its high standard of sexual morality and for its deep sense of the sanctity of marriage," and by another from so exact an observer as Mr. Bryce, who wrote nearly a generation ago that "there seems no ground for concluding that the increase of divorce in America necessarily points to a decline in the standard of domestic morality, except, perhaps, in a small section of the wealthy class, though it must be admitted that, if this increase should continue, it may tend to induce such a decline." According also to a native authority, Howard, in his "A History of Matrimonial Institutions" (1904), "it may well be questioned whether the complexity or the conflict in the

American codes is so pronounced as in the numerous systems of divorce law maintained in the states of the German Empire until the enactment of the code of 1900."

Yet why this lack of current popular interest in what would seem to lie at the very roots of national character? Against what more discreditable evil could the next nation-wide crusade direct itself than the lack of harmony in the States of the Union in all which appertains to marriage? Our spiritual need of an interstate marriage and divorce law is quite as great as was our economic need of an interstate commerce law—some compromise of local customs that shall weld baneful contradictions of principle and practice into serviceable unity. And here let it be said that the obstacles to this are in very small part clerical, but result in

the main from the tenacity of State traditions and self-satisfied indifference to the value of exact records. The churches as such, except in especial communities, continue to be powerless as ever in this country to control legislation concerning the requisites for marriage or validity of divorce. South Carolina is the one State where divorce is not permitted; the divorce laws were repealed in 1878. Prior to 1912, she presented the anomaly of requiring neither a marriage license nor a return or record of marriage. If the parties simply agreed that they were married it was enough, and no formalities were necessary either before or after. But legislation has cured this, and the assertion to the contrary in the recently published Report of the National Bureau of the Census (1919), on marriage and divorce, would appear to be inaccurate

and misleading. The section of the South Carolina Act of 1912 which reads that "nothing herein contained shall render any marriage illegal without the issuance of a license" presumably was inserted merely to protect innocent persons. Life in a community where the sole legal test of matrimony is the say-so of the contracting parties seems, however pastoral or independent, casual from the point of view of domestic stability, and lovers of formalities will be apt to condone the irony of an English commentator not many years ago, who proposed "to abolish divorce altogether and to establish the idyllic conditions of a certain American State where, owing to the absence of divorce, the laws of succession are adapted to the complicated requirements of polygamy and concubinage."

The intensity of certain prejudices

regarding marriage and how irrational they appear to other mortals, if not after a short lapse of time, to the community concerned, was never better illustrated than by the declaration of another Englishman, previously lord chancellor, that if marriage with a deceased wife's sister ever became legal the decadence of England was inevitable, and that he would rather see 300,000 Frenchmen landed on the English coasts. This was before the day when any one would have been apt to inquire if he would feel the same way if they happened to be Boches. In the meantime the ban against marrying a deceased wife's sister, which was likened by a bishop of Exeter to the horror of marrying one's own mother, has been removed in Great Britain to the relief of a highly entertained world, though ludicrously enough the act of

1907 which accomplished this omitted to sanction the marriage of a woman to her deceased husband's brother. This particular restriction by way of affinity never took root in the United States, but was virtually repudiated from the outset as inconsistent with the common-sense argument that if a wife with young children happens to die, the most suitable person in the world to be her successor may be her own sister. Even the Roman Catholic Church regards the prohibition as resting not on direct or natural law, but merely on an ecclesiastical command, and therefore claims and constantly exercises the right of dispensing with it.

But at this point native uniformity virtually ceases and the idiosyncrasies of separate or more frequently groups of States as to whom one may marry or under what conditions one may marry

are very far from identical. Happily, many of the newer and a few of the older States have taken for granted and refrained from prescribing in cold type that marriage with one's mother, grandmother, or grandchild is forbidden, but as to more debatable restrictions the statute-books remain decidedly at odds. For example, there is no consensus of opinion as to whether wedlock with a stepmother or mother-in-law is permissible, and a woman brought up on Tennyson looked aghast the other day when informed that in a number of States of the Union the intermarriage of first cousins is unlawful. As to the age of consent to marriage, in some States the common-law rule of fourteen for boys and twelve for girls obtains, but this absence of legislation is almost invariably safeguarded by a statute fixing an age limit, twenty-one for males

and ordinarily eighteen for females, below which parental consent to marriage is requisite. In other States the age of consent to marriage is defined by statute, varying according to locality all the way from twenty-one to fourteen for males, ringing the intervening changes, and from twenty-one to twelve for females. In the provisions relative to the celebration itself there is no less dissimilarity. If it will astonish some to be told that in the early days of New England, magistrates not clergymen had power to bind people in matrimony, and that prior to 1686 no marriage with "prayer-book and ring" was legal in Massachusetts, it will seem more surprising to others that though marriage by civil authorities is sanctioned universally elsewhere in the country, the laws of three States (Maryland, West Virginia, and Delaware) in-

hibit lay celebration. On the other hand, in Pennsylvania, for instance (affirmed by express statute in 1885), a bride and groom may solemnise their own marriage by taking each other by the hand and plighting their vows in the presence of twelve witnesses, one of whom should be but need not be a justice of the peace. In certain States no witnesses at all are essential, nor is the taking out of a license invariably a prerequisite, while with respect to record of the evidences of marriage, there has existed not only wide divergence as to practice, but in many jurisdictions, especially in the South and Southwest, much slovenliness and unconcern in the tabulation of these social statistics. At present, to quote from the report of the Bureau of the Census (1919) already referred to, "all of the States except South Carolina require every marriage

solemnised to be reported to some official specified by law, and for nearly two-thirds of the States there is legal provision for the State registration of marriages even though in some of these States this provision of law is not fully carried out." As has been already pointed out, the government statistician would seem to have slumbered in continuing to make an exception of South Carolina. While this shows a growing sentiment in favour of uniform methods of preserving these highly important details concerning family life, it is obvious that at least one-third of the sovereign States are still lukewarm on the subject.

This random survey of interstate idiosyncrasies reveals a national crazy-quilt of legislation relative to all that bears on matrimony, the pattern of which displays broad strips of conform-

ity in custom variegated by patches of repugnancy. The cardinal difficulty in the way of reconciling these numerous disparities so that the marriage laws of the nation may be virtually similar is the tenacity of tradition and community sentiment. Perhaps the most pressing immediate need is general adoption of the so-called marriage evasion act, the aim of which is to prevent couples disabled or prohibited from marrying under the laws of the State where they dwell from going elsewhere to be married and returning to their native State to set up housekeeping unchallenged. There is no difficulty whatever in preventing this dire and disgraceful consequence. It results solely from the legal necessity—an odd one to laymen—of recognising the marriage requirements sanctioned by a sister State, although the laws of

the original domicile would pronounce the parties fornicators. Any State has the power to prescribe by statute that the marriage of those who leave it for such a purpose shall be void within its borders. Reciprocally, it may insist that before issuing a license to a person who resides or intends to continue to reside in another State, the officer having authority shall satisfy himself by affidavit that the petitioner is not prohibited from marrying by the laws of that other jurisdiction. This meets the case of offenders both going and coming, so to speak, and seems solely in the interest of decent living; nevertheless, as has been already pointed out, no alacrity has thus far been shown by the separate States in adopting it, though a few of them have kindred provisions already. This dilatoriness is due mainly to jealousy of outside dictation or inter-

ference, but in part to a wide-spread, easy-going, sneaking sympathy on the part of democracy for people who wish to be married and are debarred by the law. It is a part of the consciousness of the courts that where a couple bent on matrimony is concerned, most people free from responsibility and some of those charged with it will let down the bars rather than put searching questions, and also that the runaway finds constantly an accomplice in the wearer of holy orders. As Mr. Howard (already quoted) well asks in his closing pages: "Is there any boy or girl so immature, if only the legal age of consent has been reached; is there any 'delinquent' so dangerous through inherited tendencies to disease or crime; is there any worn-out debauchee who cannot somewhere find a magistrate or priest to tie the 'sacred' knot?"

False sentimentality in alliance with the vulgarly independent notion that marriage in a democracy is nobody's real business except the bride's and groom's has a tendency to nip and retard measures which like forward shoots in a heterogeneous garden mark the vitality of social ethics, for lack of uniformity has proved by no means a bar to separate development. No less than six States have registered their faith in eugenics by legislation which requires either an affidavit or certificate from persons intending to marry that they are free from sexual disease. Yet the attempts to prove these laws unconstitutional on the ground, among others, that they interfere with the religious liberty of the contracting parties illustrate the reluctance of both the prudish and the ignorant to trammel the so-called rights of the individual for the

sake of the general welfare. One would assume that the marriage of the epileptic, imbecile, or feeble-minded would be universally prohibited as tending to perpetuate idiocy, shiftlessness, and crime, but the roll-call of the States would show that the statutes restraining this are little more numerous than those to prevent the clandestine marriage outside the State of residents who thus seek to evade the requirements of their own laws.

It will be long, perhaps, if ever, before all the local peculiarities of marriage are reconciled and the United States becomes one table-land of conformity to the detriment possibly of racial flavour and distinction. The several communities are likely to continue hard to convince when the issue is merely the superiority of other tribal customs to their own. Yet it should

be clear to all who think of them in terms of a nation that the existence of a separate marriage code in each of forty-eight independent, sovereign, and contiguous commonwealths, providing usually a passport for all who wish to evade it to seek some less exacting jurisdiction with impunity, is a menace to the stability as well as the repute of American family life. Can we wonder that the domestic purity on which we pride ourselves is sadly discredited by such a hydra-headed condition of the body politic? Is it strange that foreigners should shrug their shoulders and decline to believe that the institutions of a country where a woman may be adjudged wife, concubine, or bigamist, according as she inhabits one or another of several cities within the radius of a hundred miles, can be either exemplary or a stimulus to virtue? Yet the real

stigma attaching to the American institution of marriage should not be ascribed to the mere prevalence of divorce, but rather to the facilities afforded by prejudice against interstate co-operation to the lawless and evil-disposed to utilise the map of the United States for a "three-card monte" game which leaves alike the priest, the lawgiver, and the man in the street perpetually misled as to the permanence of any marriage if the contracting parties are bent on dissolving it. Nor may we cavil at those who challenge the sincerity of a people who could so easily, if they chose, eradicate much of this scandal by an offensive defensive interstate alliance such as is provided by the uniform evasion act, which would leave few loopholes, if any, for the lascivious and godless. It is erroneous to suppose that there is at present much

variance between the States in the grounds on which divorce is granted; with few exceptions they are identical in the main.

It was brought out at the conference of the International Law Association at London in 1910 that there is not a cause for divorce in the United States which cannot be duplicated on the continent of Europe, and that in most European countries mutual assent is a cause for divorce under certain restrictions. The confusion that throws a shadow on our family life and gives to foreigners a wrong impression regarding it is due largely to the flitting from State to State which too much insistence on local sovereignty safeguards to the peril of national domestic morals.

Yet with this abuse remedied, we have still to reckon with collusive divorce which when both parties are

agreed on severance of the bonds of matrimony makes incompatibility the decisive factor provided sufficient evidence be trumped up to satisfy one of the legal statutory grounds—roughly speaking, adultery, cruelty, desertion, drunkenness, neglect to provide.

In his highly entertaining but frankly cynical play "Why Marry?" Mr. Jesse Lynch Williams holds up a mirror to the American people in which the only benedicts who remain unblemished are the couple who just before the curtain falls are saved from the radical expedient of consorting together unconventionally by a quick-witted lawyer who, in spite of themselves, pronounces them man and wife according to the law of the State where they happened to be because they had so declared themselves to the assembled company. The interrogation of the comedy is a timely

challenge to that American self-consciousness which reads into the marriage service the proviso that "until death do us part" is merely a Pickwickian phrase; but the satire is directed quite as much at the lack of spiritual consideration with which matrimony is entered into as at the ease with which it is shuffled off. Even the mercenary and utilitarian marriages of European countries acquire a certain dignity when compared with those of the same sort here from the formalities which attend them and from the lack of reserves as to their endurance. People in Europe still expect to stay married even though disillusioned and are correspondingly circumspect in consenting to wed; but with us the deliberation which ought to precede the most solemn function in life is too apt to yield to the democratic innuendo: "Why worry

when escape is so easy if one wearies of it?"

That consciousness of the courts which sees in the refusal of the churches to countenance divorce except for a single cause, if any, only a losing battle that grows more hopeless every year, is not, on the other hand, blind to a tendency among the people of the United States to substitute incompatibility for graver grounds and thus to make the dissolution of marriage hinge on caprice instead of some tangible grievance. The latest report of the National Census Bureau once more discloses not only an increase in the ratio of divorce to marriage, but in the ratio of divorce to growth of population—112 divorces to every 100,000 people in 1916, as against 84 in 1906, and 73 in 1900. There were 112,036 divorces granted in the country in 1916, concerning 108,702 of which

there are exact statistics; of these, 39,990, more than a third, were for desertion, with cruelty second, the two combined accounting for very nearly two-thirds (65.1 per cent) of all the divorces granted in that year, adultery figuring far behind, and drunkenness lagging in the rear. While these causes preserve the same order as in the two previous censuses of twenty years apart and are deceptive so far as they may sometimes conceal the real reason for separation, they indicate on their face that one or the other spouse had wearied of the association—a decision the social morality of which rests on the individual conscience. Once more, too, it appears that the proportion of divorces granted to the wife in comparison with the husband has not stood still, the 66.6 per cent determined by the twenty-year investigation from

1887 to 1906 having risen to 68.9 per cent of the whole. While a portion of this discrepancy between the sexes is explicable on the ground that the wife has a legal cause for divorce more frequently than the husband, and that certain grievances such as failure to support and cruelty are more peculiar to the wife, the assumption that married life in this country continues to be purer than elsewhere in the world must face the dual knowledge that more people continue to obtain divorces in the United States than ever before and that a larger number of the applicants are women. While the vital social conviction of our day that both sexes—and especially wives—have a right to demand a larger measure of decent living from a partner for life may partly account for and justify this, there are signs that the mere weariness with the

marriage relation, which results when love flies out of the window independent of tangible causes, offends the scruples of fewer wives than formerly as a self-respecting ground for divorce. In this connection it is interesting to note that at the very moment when the mutual obligations of matrimony are in a state of flux, owing mainly to the revolt of woman, the Bolshevist programme should out of its murky consciousness prescribe as a panacea that her right to suit herself in husbands should be abrogated and turned topsyturvy.

It should be added that where innocent parties to marriage are concerned the policy of the legislatures and the courts has generally, though by no means universally, kept pace with the humanitarian tendencies of the age. Offspring born out of wedlock become legitimate nearly everywhere on the

marriage of their parents. It is law in some States and should be in all that a marriage solemnised by any one falsely professing legal authority to perform it is valid if either the man or woman thus united is honestly deceived; the parties remain husband and wife, and the bogus clergyman or justice of the peace is subject to fine or imprisonment. In the same spirit the statutes often provide that, if a man or woman marry during the lifetime of a husband or wife with whom marriage is in force, but in good faith and full, though erroneous, belief that the previous marriage has been terminated by death or divorce, the second marriage becomes valid as soon as the impediment is removed by the death or divorce of the other party to the former marriage, and the issue of the second marriage are legitimised.

It was bitterly claimed in a case before me that "good faith" implied that the second wife should have taken proper precautions to ascertain whether the story which the man told her as to his divorce was true, but each court which considered the point held that all the statute required was honest intention, not prudence. Indeed, it may be said that in most jurisdictions in this country the law already stretches a point to avert the full consequences of an irregular marriage involving an innocent person—a course which subsequent uniformity will perfect. Couples who wish to stay married are given ample protection under our legal systems. The vital question for Americans to consider is whether refusing to stay married by hook or crook and incidentally hoodwinking the courts is to

be rated as a perquisite of liberty plus respectability if the petitioner has missed happiness—for what else does the growth in our divorce rate portend?

Date Due

MAY 15 '75

KF 478 G76

Author

Grant, Robert

Title

KAw and the family

Copy

Date

Borrower's Name

15'202

BURKHART

NOTE